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NPDES Compliance Monitoring Inspector Training: Legal Issues

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This document is part of a set of five documents which make up the National Pollutant Discharge Elimination System (NPDES) Compliance Monitoring Training Program. The training modules were developed by the Environmental Protection Agency (EPA), Office of Water Enforcement and Permits (OWEP), to instruct NPDES inspectors in various aspects of conducting NPDES Compliance Monitoring Inspections. The five training modules in this set are: 1) Overview, 2) Legal Issues, 3) Biomonitoring, 4) Sampling Procedures, and 5) Laboratory Analysis.

The training module covers the legal issues —

The modules were designed to be used as a self-taught course or as the basis for a lecture course to supplement on-the-job training for NPDES Inspectors. The modules should be presented by experienced and knowledgeable staff who can answer any questions, discuss policies regarding the topic being presented, and conduct on-the-job training. Each module covers a specific aspect of a compliance inspection. Instructors for a particular module may be selected according to their expertise, and training sessions could be scheduled based on the needs, the resources, and the time available to the Region. The modules can be presented individually or as a complete package.

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NPDES Compliance Monitoring Inspector Training

Legal Issues

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NPDES COMPLIANCE MONITORING
INSPECTOR TRAINING MODULE
LEGAL ISSUES

U.S. ENVIRONMENTAL PROTECTION AGENCY

ENFORCEMENT DIVISION
OFFICE OF WATER ENFORCEMENT AND PERMITS
COMPLIANCE BRANCH
JUNE 1980

DISCLAIMER

This module has been reviewed by the Office of Water Enforcement and Permits, U.S. Environmental Protection Agency, and approved for publication. Mention of trade names or commercial products does not constitute endorsement or recommendation for use.

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These modules were developed by Barbara A. Schick, Claire M. Gesalman, Duane Geuder, Edward Bender, and with contributions by Dave Shedroff, all of whom are staff members of the Enforcement Division, Office of Water Enforcement and Permits. The Compliance Branch, Enforcement Division, Office of Water Enforcement and Permits, wish to express their appreciation to the secretarial staff for the assistance provided in the preparation of this module, especially Mrs. Mary F. Rogers and Mrs. Wilma Haney.

LIST OF APPENDICES

A. MARSHALL V. BARLOW'S DECISION

B. SECTIONS OF THE CLEAN WATER ACT RELEVANT TO NPDES INSPECTORS

C. NEUTRAL INSPECTION PLAN

D. SAMPLE 308 LETTER

E. CREDENTIALS

F. SAMPLE WARRANT

FOREWORD

The National Pollutant Discharge Elimination System (NPDES) Compliance Monitoring Inspector Training Modules were developed by the Environmental Protection Agency (EPA), Office of Water Enforcement and Permits (OWEP), to instruct NPDES inspectors in various aspects of conducting NPDES Compliance Monitoring Inspections.

The EPA Regions have identified a need for training materials to instruct new employees in conducting NPDES inspections. Training seminars that are currently offered either do not address the training needs of an NPDES inspector or are not available due to limited resources or conflicting course schedules. These training modules were developed to fill the Regions' need for in-house inspector training.

The objectives of the training modules are:

1. To acquaint new inspectors with the NPDES Compliance Inspection program;
2. To serve as a refresher course for experienced NPDES Inspectors;
3. To assure consistency in the NPDES Compliance Inspection program; and
4. To inform and instruct inspectors concerning new inspection procedures.

The modules were designed to be used as a self-taught course or as the basis for a lecture course to supplement on-the-job training. The modules should be presented by experienced and knowledgeable Regional staff who can answer any questions, discuss Regional policies regarding the topic being presented, and conduct on-the-job training.

The module format was chosen for this training program because of its flexibility. Each module covers a specific aspect of a compliance inspection. Instructors for a particular module may be selected according to their expertise, and training sessions could be scheduled based on the needs, the resources, and the time available to the Region. The modules can be presented individually or as a complete package.

An outline of information contained in the individual training modules is listed below. There are currently five NPDES Compliance Monitoring Inspector Training modules:

1. The Overview module gives the inspector an overview of the compliance program and a brief summary of the different types of compliance inspections.

FOREWORD (Continued)

2. The Legal Issues module outlines the legal issues which must be addressed during an inspection and legal information that will assist inspectors in performing their duties.

3. The Biomonitoring module outlines the principles of biomonitoring and the role of biological testing in the inspection program.

4. The Sampling module details the sampling procedures that an inspector uses when conducting a sampling inspection.

5. The Laboratory Procedures module outlines the procedures and information necessary for an inspector to perform an effective evaluation of a permittee laboratory.

The layout of the text of each module is on a half page so that students may include their notes with the text.

These training modules were developed for the Regions and are designed to be used by the Regions for in-house training. If these modules are to be a success, the Regions must participate in their ongoing development. This can be accomplished by providing EPA Headquarters with changes or information which Regional instructors or managers believe would improve the modules. The format of the modules can be updated and revised at OWEP as the need arises as they were developed and produced at EPA Headquarters. Cooperation and commitment to training by the Regions will promote the development of a useful training document.

These training modules were developed primarily for Regional NPDES Inspectors; but they are also available to other interested parties such as State offices, attorneys, other program offices, facility owners and operators, and members of the general public.

Comments, information, and suggestions to improve the modules should be addressed to the:

Technical Evaluation and Support Section (EN-338)
Office of Water Enforcement and Permits
U.S. Environmental Protection Agency
401 M Street, SW
Washington, D.C. 20460

Modules covering new topics may be added to the existing ones as the need arises. Subject suggestions for future modules should be sent to the above address.

Requests for training modules will be handled at the above address depending on available supplies.

TABLE OF CONTENTS

DISCLAIMER P. I

ACKNOWLEDGEMENT P. II

LIST OF APPENDICES P. III

FOREWORD P. IV

TABLE OF CONTENTS P. VI

I. INTRODUCTION P. 1

II. BACKGROUND P. 1

III. AUTHORITY P. 4

IV. PERSON SUBJECT P. 7

V. PREINSPECTION LEGALITIES P. 7

- A. Neutral Inspection Plan P. 8
- B. 308 Letter P. 9
- C. Confidentiality P. 10
- D. Compliance File P. 16
- E. Permittee Rights P. 16

VI. INSPECTION OBJECTIVES P. 16

VII. INSPECTION LEGALITIES P. 18

VIII. WARRANTS P. 21

- A. Administrative Warrant P. 22
- B. Obtaining the Warrant P. 23
- C. Criminal Search Warrant P. 25

IX. GATHERING AND PRESERVING EVIDENCE P. 27

X. BASIS FOR TESTIMONY P. 28

XI. PRESENTING EVIDENCE FROM INSPECTIONS P. 28

- A. Admissibility of Evidence P. 29
- B. Serving as a Witness P. 30

XI. LIABILITIES P. 32

XII. SUMMARY P. 32

APPENDICES

NOTES	LESSON
I. INTRODUCTION	I. INTRODUCTION
Scope of Module	This training module covers the legal aspects of pollution control as they apply to compliance monitoring under the Environmental Protection Agency's (EPA) National Pollutant Discharge Elimination System (NPDES) Program. Included in the course is a discussion of how the law is relevant to the NPDES Program and how it should be taken into account during inspections and hearings or trials arising from inspections. Many of the legal principles presented here can be useful in your work outside the NPDES.
Outline of Module	The module begins generally with a review of the various types of law and an overview of their relationship to NPDES. The legal roles of the Administrator, the permittee, and their agents are described. The module will emphasize how the law affects the inspector's duties to gain access to identify, gather, preserve, and present evidence.
II. BACKGROUND	II. BACKGROUND
Purpose	The purpose for learning the legal aspects of NPDES or other EPA programs may not be readily apparent. Many of us know our jobs and have learned through experience how to conduct ourselves. However, an understanding of the law can make you more comfortable. Court proceedings do not have to be mysterious rituals. Your understanding of the law can also put others at ease. All of us can probably recall some instance when a calm statement of explanation defused a potentially explosive dispute. Such occurrences are quite possible in an inspection situation.
	An understanding of the legal basis for inspection activities may also help you to decide what to do under unusual

and unforeseen circumstances. Finally, an understanding of the law allows you to see some of the underlying reasons for procedures that might otherwise seem unnecessarily time-consuming or complex.

Applicability of Information

Many of the principles discussed in this module are applicable to your role as an inspector or as a witness in the enforcement of other EPA regulations and Federal laws. The basic problems of legal entry may arise in all types of regulatory inspections. The legal basis for methods of collecting and preserving evidence are essentially uniform for most civil and criminal investigations. Additionally, proper attitude and behavior for a witness varies little among different legal forums.

Legal principles are meant to be applicable to a variety of different circumstances. Laws enable society to be organized to the extent that they make the outcome of business, political, and social interactions predictable.

Legal Authority

To understand better how inspection and enforcement activities fit into our legal system, let's explore the sources of legal authority that support EPA's mission under the Clean Water Act.

Types of Legal Authority

Legal authority in our system of Government comes from (a) the U.S. Constitution, (b) legislation passed by Congress, (c) common law principles established and developed by court decisions, (d) regulations adopted by Government agencies, and (e) court decisions interpreting the first four and showing their application under varying factual circumstances.

Origin of Authority

The U.S. Constitution is the foundation for all powers exercised by the Federal Government. Only those powers that are specifically granted or implied to Federal authority in the Constitution can be exercised by the

Federal Government. Specifically, the Constitution provides for Congress to pass laws; for the executive branch and its agencies to administer or carry out (execute) the laws; and for the Federal courts to interpret or explain those laws, to settle or resolve disputes over the laws, and ultimately, to authorize and determine specific sanctions or punishment for violation of the laws.

EPA Authority

Congress exercised its legislative authority under the Constitution by passing the various water pollution control statutes, the latest of which is the Clean Water Act of 1977 (Public Law 95-217), herein after called the Act. The 1977 Act revised the Federal Water Pollution Control Act Amendments of 1972 (Public Law 92-500). In the Clean Water Act, Congress has given EPA the authority to regulate the discharge of pollutants to waters of the United States, i.e. to issue permits, obtain information, inspect, and take enforcement action. The statute gives EPA broadly defined authority to establish the National Pollutant Discharge Elimination System Permit Program to define control technologies and establish effluent limitations based thereon, to obtain information through reporting and compliance inspections, and to take enforcement actions, both civil and criminal when violations of the Act are found.

Because the Act does not itself define each detail to be followed by EPA, Congress has authorized the Agency to develop regulations to carry out the law.

Whenever the Agency adopts a regulation, that regulation has the same force and effect as if the law were passed by Congress, assuming the regulation is within the Agency's authority and is constitutional. EPA's current regulations are the NPDES Permit Program were promulgated on June 7, 1979, and are found in the Code of Federal Regulations (CFR) at 40 CFR Parts 122 through 125. These regulations were then incorporated into the Consolidated Permit Regulations, 45 FR 33289, issued on May 19, 1980. The Consolidated Permit Regulations were developed in order to consolidate requirements and procedures for five EPA permit programs including the NPDES program under the Clean Water Act.

III. AUTHORITY

III. AUTHORITY

The authority for EPA to conduct inspections, including the inspector's rights to enter premises on which an effluent source is located and to have access to records, monitoring equipment, and methods, is found in Section 308(a)(B) of the Act. Further specification of authority to inspect permitted facilities is found in 40 CFR 122.14(f) [Conditions Applicable to All Permits]. General conditions affecting monitoring requirements for permits are found in 40 C.F.R. Part 122, Subpart C, "Permit Compliance."

Appendix A:
Marshall v Barlow's

Authority for an agency or its inspectors to act is always limited in some way--by the Constitution, by the authorizing law or regulations, or by the common law, i.e. decisions of courts that define the limits of authority. For example: Inspections of regulated facilities by representatives of Federal agencies recently came up for review by the U.S. Supreme Court, in Marshall v Barlow's Inc., 436 U.S. 307, decided in 1978. This case is usually referred to as the Barlow's case (see Appendix A). In the case, the court examined the constitutionality of the inspection program conducted by the Occupational Safety and Health Administration (OSHA). The Supreme Court concluded that the Constitution guarantees against unreasonable searches and seizures and limits the authority of OSHA inspectors to enter work sites unless the inspector has either (1) obtained proper consent, or (2) obtained a search warrant. The decision also shows that except in specific situations an owner may not be punished or fined for insisting that the inspector obtain a search warrant before entering the premises for an inspection. How the Barlow's case affects inspections will be covered a little further on in detail.

In order to determine whether the permit conditions are met by the NPDES permittee, Section 308 of the Act allows for inspection and monitoring. In effect, the section provides for two types of monitoring. First, the permittee must monitor himself: "... the Administrator shall require the owner or operator of any point source to ...maintain records, ...make reports, use monitoring methods,...sample effluents, ...and provide other information...." in a manner prescribed by the Administrator. Second, the Administrator of EPA may check the permittee's monitoring, and conduct his own monitoring. "The Administrator ... shall have a right of entry to...any premises in which an effluent source is located or in which any records required to be maintained...are located, and may...have access to and copy any records, inspect any monitoring equipment or method,...and sample any effluents which the owner or operator of such source is required to sample." Although the Act grants to the Administrator of EPA the power to monitor permittees, it is obviously impractical for the Administrator himself to visit every permittee's premises. So Congress, in subsection 308(a) of the Act, gave the authority to enter, inspect, and sample to "...the Administrator or his authorized representative, upon presentation of his credentials."

NOTES	LESSON
Credentials	An inspector is issued credentials designating him as an authorized representative of the Administrator. An inspector's credentials are his proof of authority to enter and inspect a facility and must, therefore, always be presented when entering a facility. This is to protect permittees from unauthorized inspections. The use of Agency enforcement credentials also protects the inspectors, as will be discussed later in the module. Failure of an inspector to present credentials may be a point on which an enforcement case is thrown out of court. An inspector, on entering a facility, must gain consent to inspect the facility from a company official authorized to give the consent. Again, like showing credentials on entry, this must be done to assure that the data collected is admissible in court; later we will discuss how to ensure "consent" before an inspection is conducted without a warrant. We have already discussed the fact that the inspector is an agent, or representative of the Administrator, whose job is; visible (few other EPA representatives come in direct personal contact with regulated companies); important (gathering and reporting information to help the Agency do its job is essential to the success of the Agency's efforts); sensitive (no company or organization is going to rejoice at the business inconvenience associated with the arrival of a Government inspector); and highly responsible (an inspector's credentials directly confer the authority to inspect facilities for compliance --with no other control or supervision). Thus, the inspector should take his or her authority seriously.

IV. PERSON SUBJECT

Appendix B: Relevant Sections of the Act

IV. PERSON SUBJECT

In conducting an inspection, an inspector must first ask who is subject to EPA authority to be inspected under the Clean Water Act. To determine who may properly be inspected, we look to the statutes (particularly Section 301, 308, 402, and 502 of the Act, see Appendix B) and the NPDES regulations, 45 FR 33289, Monday, May 19, 1980, ("Who" is a permittee or applicant).

The objective of the Clean Water Act is to restore and maintain the chemical, physical and biological integrity of the Nation's waters. To achieve this goal, Section 301 of the Act prohibits all discharges of pollutants by any "person," ("person" including individuals, partnerships, corporations, States, municipalities etc., as defined in Section 502 of the Act) except as allowed by the Clean Water Act. In Section 402 of the Act, the Administrator can issue a permit for the discharge of any pollutant, or combination of pollutants that meets the requirements of Sections 301, 302, 306, 307, 308, and 403 of the Act or conditions that the Administrator determines are necessary to carry out the provisions of this Act.

Section 308 of the Act allows the Agency to obtain information necessary to carry out the provisions of the Act.

To the NPDES inspector, the different sections of the Act mean that an inspection may be conducted wherever there is a existing NPDES permit or, when no permit has been issued, a discharge exists or is likely to exist, and information to carry out the provisions of the Act is necessary.

V. PREINSPECTION LEGALITIES

V. PREINSPECTION LEGALITIES

Before conducting an inspection, an inspector should be aware of the legal issues surrounding an inspection. Some of these issues involve a) the selection of sites for conducting an inspection (Neutral Inspection Plan), and b) entry to a facility (308 Letter and Confidentiality).

Neutral Inspection Plan

A. Neutral Inspection Plan

To begin with, an inspector should be aware of the Neutral Inspection plan for NPDES Compliance Inspections. In response to the Supreme Court decision in Marshall v. Barlow's Inc., 436 U.S. 307 (1978), the Neutral Inspection Plan was developed to be used when targeting routine compliance inspections. The purpose of the plan is to eliminate any bias in targeting inspections (see Appendix C).

Appendix C: Neutral Inspection Plan

Compliance inspections performed under the NPDES Program can be divided into two general categories: (1) those inspections targeted using administrative factors, such as time since the last inspection; and (2) those inspections targeted due to civil probable cause, e.g., based on specific evidence of an existing violation.

Inspections based on the second category are based on prior knowledge of apparent or probable permit violations. Factors which constitute specific evidence include: (1) violations reported on recent Discharge Monitoring Reports (DMRs); (2) citizen complaints; (3) response to emergency situations, such as threats to public health or safety; (4) follow-up to previous inspections which indicated violations; and (5) specific inspections for enforcement case support.

It is for the first category of inspections, those based on administrative factors or routine inspections, that the Neutral Inspection Plan outlines the administrative factors to be used in targeting inspections. By using the plan, facilities are targeted objectively and a rationale is provided for obtaining an administrative warrant if right-of-entry to inspect an NPDES facility is denied and probable cause is not a factor.

The criteria for targeting permittees for Neutral Compliance Inspections are the time that has passed since the last inspection and the geographical grouping of the permittees. Only these factors may be considered for the Neutral Inspection Plan. Other information, such as data from DMRs which indicated apparent violations, would not be used in the plan since this would constitute probable cause under the civil standard. However, the existence of such data would not preclude the facility from being considered for a Neutral Inspection if the Neutral Plan is followed during the selection process. The only permittees who would not be considered when targeting Neutral Compliance Inspections are permittees who are in current litigation with EPA. This does not apply to State litigation. For more information on this subject, you should refer to the Neutral Inspection Plan itself.

308 Letter

B. 308 Letter

In preparing to conduct an inspection, a 308 letter is sent to the permittee that is to be inspected. A 308 letter is called such because it sites the authority under Section 308 of the Act to inspect a facility (see Appendix D).

Appendix D: Sample 308 Letter

The purpose of the 308 letter is to advise the permittee that an inspection is scheduled for a certain facility within the next six months. This forewarns the permittee that an inspection is imminent. The 308 letter usually requests information regarding on-site safety regulations to avoid problems concerning safety equipment at the time of the inspection.

The 308 letter may also specify the exact date of the inspection if surprise is not necessary, and coordination with the permittee is required, such as may occur with a Performance Audit Inspection.

The 308 Letter is also used to inform the business of its right to assert a claim of confidentiality.

Confidentiality

C. Confidentiality

Background

As noted in the previous section, when conducting compliance inspections an inspector may have to deal with claims of confidentiality as authorized under Section 308 of the CWA and as defined under 40 CFR Part 2. This section of the statute is designed to protect confidential business information from unauthorized disclosure. Confidential business information includes information considered to be trade secrets (including chemical identity, processes, formulation, or production data) that could damage a company's competitive position if it became publicly known.

Normally, information collected during an inspection would be made available in response to a Freedom of Information Act (FOIA) request unless the information were determined to be exempt from release under strict FOIA criteria. If the data has been claimed confidential business information by the company, EPA would follow certain procedural steps prior to release of the information and the data would not be released at all if it was determined to be entitled to confidential treatment.

Right to Claim Confidentiality

Any business being inspected under the authority of Section 308 of the Act has the right to claim all or any part of the information an inspector request or has access to during an inspection as confidential. EPA must notify the business of its right to assert a claim of confidentiality. The business may be notified of this right in the 308 letter of notification. By also including in the 308 letter a time period within which the business should respond, EPA will be alerted to any potential problems concerning confidential information which the inspector may encounter, before the actual inspection. This will avert needless waste of resources while inspectors attempt to negotiate claims of confidentiality and related right-of-entry problems at the time of the inspection. This is especially important when contract inspectors are being involved in inspection activities.

40 CFR 2.203(c) provides that the affected business may also assert a claim of confidentiality at any time after the information is submitted to EPA. Therefore, the business is entitled to make a claim to the inspector at the time of the inspection or at any time subsequent to the inspection. Any claim must be in writing and signed by a responsible company official.

While the business is entitled to make a claim of confidentiality on all information which an inspector requests or has access to while on-site, claims of confidentiality are subject to review by the EPA legal office. The claim of confidentiality by a business relates only to the public availability of such data, not to its availability to inspectors performing duties under Section 308.

When a business makes a claim of confidentiality, the Regional office will not normally make a determination as to the applicability of 40 CFR Part 2 until there is a request for the information from a third party. The business may want to request a determination before that time. Such a request should include the reasons for the claim as well as supportive technical data and legal authority. The exact procedures for making and handling these requests are contained in 40 CFR Part 2. Until such a time as that determination is made, the information shall be treated as confidential information.

A business may also make a claim of confidentiality on any reports which are generated by the inspector concerning a specific inspection. The business should make a claim in its response to the 308 letter which it has received.

In some cases, entry to a facility may be denied based on the claim by a permittee that there may be confidential information at the facility. In such cases the inspector should recite the relevant subsections of Section 308 of the Act substantiating the lawful authority to enter the facility so they are clearly understood by all parties involved. The inspector should then explain the provisions of 40 CFR Part 2 concerning confidentiality. The inspector should have in his possession a copy of both the 308 letter which was sent to the business and the businesses response.

The inspector should present these documents to the facility representative. If the facility representative still refuses the inspector entry, the inspector should not contest the issue but should treat the matter in the same manner as any denial of entry. The inspector should immediately notify the appropriate EPA enforcement office for instructions.

Types of Information Excluded from Confidential Treatment

In order to understand claims of confidentiality, an inspector should know the type of information that may be considered confidential. These types of information are defined in 40 CFR Part 2. The inspector should inquire about Regional policy regarding confidentiality.

The regulations specifically exclude certain types of information from confidential treatment. Under the authority of Section 308(b) of the Act, this includes all information contained in the businesses NPDES permit and all "effluent data." Under 40 CFR 2.302 (a)(2)(i), effluent data includes all information necessary to determine the identity, amount, frequency, concentration, temperature or other characteristics (to the extent related to water quality) of:

1) any pollutant which has been discharged by the source (or any pollutant resulting from any discharge from the source), or any combination of the foregoing; and

2) the pollutant which, under an applicable standard or limitation, the source was authorized to discharge (including, to the extent necessary for such purpose, a description of the manner or rate of operation of the source).

NOTES	LESSON

Effluent data also includes a general description of the location and/or nature of the source to the extent necessary to distinguish it from other souces (including, to the extent necessary for such purposes, a description of the device, installation, or operation constituting the source).

Compliance inspections are concerned with the gathering of information which would be defined as "effluent data" within the meaning of 40 CFR. However, in some cases, the inspector may want to request information which may not be strictly "effluent data" and which the business might want to consider confidential information (e.g., when information on process or production level changes would be helpful to verify that the permit adequately characterizes the effluent waste stream of the business).

Secrecy Agreements

Inspectors, either EPA or contractors conducting NPDES compliance inspections for EPA, shall not sign any pledge of secrecy or confidentiality agreements regarding information received while inspecting a facility. Any agreement which would limit the Agency's ability to disclose information should never be signed. Section 308 does not specify that a secrecy agreement must be executed as a condition of entry. Unauthorized disclosure of confidential information by EPA employees is prohibited by law (33USC1318(b)). Similarly, since these requirements are included in all EPA contracts with the private sector, contract inspectors are subject to the same restrictions as EPA inspectors. All contractor inspectors sign a statement which states that they will be personally bound by 40 CFR Part 2.

Whether information claimed to be confidential by a business will later be determined not to be confidential business information is of no concern to the compliance inspector. Once a claim is made, the information must be kept confidential until the determination is made by the appropriate EPA legal office.

EPA Inspectors and Confidential Information

The regulations of 40 CFR Section 2.211 preclude EPA employees from using or disclosing any business information which was obtained during the performance of the employee's official duties. In addition, EPA employees must take all appropriate action to safeguard confidential business information from improper disclosure. This includes information that a business has claimed to be confidential and for which no determination has yet been made by the EPA legal office.

EPA employees who violate these requirements are subject to dismissel, suspension or fines. Criminal action may be taken against EPA employees who disclose business information.

Contractors and Confidential Information

A contractor with EPA who obtains business information during execution of an EPA contract can disclose information only as allowed in the contract. Violation of these requirements by a contractor may be grounds for suspending the contract or contractor employee. The Clean Water Act does not provide for criminal sanctions against contractors who willfully violate the contract requirements concerning confidential business information.

NOTES	LESSON
Compliance File Reference: NPDES Compliance Evaluation Inspection	D. Compliance File To prepare further for an inspection, the inspector should have a compliance file put together before an inspection. This file (described in the Compliance Evaluation Manual) should contain a copy of the permit, the 308 letter, and the name and number of the persons of authority at the facility and previous inspection reports. The inspector should have also coordinated the inspection with all offices involved, such as State or local government. Good preinspection coordination will prevent many problems from occurring.
Permittee Rights	E. Permittee Rights The Clean Water Act states, "The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." However noble the purpose of the Act, its execution is, nevertheless, limited by the rights of persons subject to the Act. As a general principle of law, constitutional rights cannot be irrevocably sold, forfeited, or otherwise relinquished. The NPDES regulations require one condition in all permits, that the permittee allow certain inspection powers to EPA representatives. But in doing so, the permittee really does not bargain away any of his own rights because the inspection powers are no more extensive than those granted in Section 308.
VI. INSPECTION OBJECTIVES	VI. INSPECTION OBJECTIVES Anyone who has had field experience should already be familiar with the objectives of an inspection. What does an inspector inspect during an NPDES inspection? From a legal standpoint, this question should be answered by the Clean Water Act.

Limitation of Inspections

Section 308 and NPDES regulations provide the general authority (scope) and limitations for inspections. Terms and conditions of a permit, however, more precisely define the authority to inspect a permitted facility. In the absence of unusual circumstances, all compliance inspections should be conducted only with reference to the permit. If something unforeseen arises during the inspection, make note of the occurrence and report it to a supervisor or Agency attorney.

Identification of the premises, source or sources of discharges, sampling points, monitoring equipment, and point(s) of final discharge should also be specified in the permit.

The type of sampling that may be done at the facility is determined by the terms of the permit. Concentration of pollutants and temperature, appearance, and flow rate of the effluent are examined to provide information regarding a permittees compliance.

The objects of inspection that have been discussed so far allow EPA to monitor pollutant effluents from a permittee's source. Clause (A) of Section 308(a)(4) states, "The Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including, where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require." Clause (B) provides that EPA inspectors may have access to and copy the records, and inspect the equipment or methods required in Clause (A). This access is allowed even if the records are not kept on the same premises as the effluent source.

NOTES | **LESSON**

An inspection under the authority of Section 308, may take the inspector to property:

A. Across which an effluent flows

B. From which the effluent was first conveyed

C. Wnere a permittee collects effluent samples

D. Where the effluent samples are analyzed

E. Where the permittee's records of analysis are kept.

Once he is granted access to all such property, the inspector may view the source, sample the effluent, read and copy the records, and inspect the monitoring equipment and methods.

VII. INSPECTION LEGALITIES

Entering the Facilities

VII. INSPECTION LEGALITIES

To conduct an inspection, the inspector should arrive at the facility and enter through the front gate. It is stated in the Act that inspections be made "at reareasonable times." This expression implies the normal business hours of the permittee; but exceptions may be made in cases of evasive permittees, emergencies, etc. However, an inspector may attempt to make use of exceptions only after obtaining the approval of his or her supervisor and an Agency attorney.

Presenting Credentials

Appendix E: Credentials

Upon arrival at the plant location, the inspector should "fill in the blanks" in his information as soon as possible, that is, check the owner's name and the plant address, ascertain who is in charge at the plant, etc. The inspector should sign in, and EPA credentials should be presented to show that the inspector is an authorized representative of the Administrator (Appendix E). The inspector (or contractor conducting inspections for

EPA) should, under no circumstances, sign either a confidentiality agreement or a liability waiver. If the inspector is denied admittance because he will not sign either of the above, the inspector should leave and notify his supervisor at once.

Obtaining Consent to Inspect

The first step, after presenting one's credentials and explaining the purpose of the visit, is to find a person having authority to consent to the inspection. That is, the inspector must seek the permission of an agent or authorized representative of the facility. The key here is that "the person in charge" must be contacted. The most direct method for obtaining consent to inspect is the "take me to your leader" approach. In all seriousness, the inspector's responsibility is to speak to the plant employee or agent, or representative who has sufficient authority over the plant to permit access to the plant for the inspection. By gaining consent to inspect the facility from the proper authority, the inspector is guaranteeing the constitutional right of the permittee (as determined by the Barlow decision) against unreasonable searches and seizures.

Steps for Entering a Facility

The important steps are to:

A. Identify yourself and display your credentials to the "person in charge."

B. Explain clearly why you have come to the plant, what you want to see, and that your work is being done under Section 308 of the Clean Water Act. (Have a copy of Section 308 to show the person in charge if that person does not know or understand what Section 308 is.)

C. Explain that it is the permittee's right to claim material confidential and that you as an inspector, under Section 308, may examine areas relating to effluent production or storage even if it has been claimed confidential.

D. Ask for permission to begin the inspection. An inspector may not go to a nonpublic area of the plant without consent (or a warrant) and should not attempt to do so.

The consent of the person in charge must be informed and voluntary. Informed consent means the person must understand the purpose of your visit. Voluntary means that consent is given freely and not based on trickery or coercion. If a person in charge refuses to allow an inspection, you may advise the person that they may wish to consult with counsel prior to deciding to refuse entry and that you are required to report the refusal of entry to your supervisor who will then determine if EPA will seek a search warrant. This is a truthful statement of what you will do and are legally entitled to do. Under no circumstances is it proper to threaten any punishment for the person's refusal of consent. In Barlow's, the Supreme Court ruled that no sanction may be imposed upon an owner who declines to consent to inspection but instead insists upon a warrant.

Withdrawal of Consent

Court has also stated that consent may be withdrawn. Therefore, if the "person in charge" tells you to stop an inspection and to leave the premises, you should proceed as if consent has not been given for you to do anything further. You must then follow the steps for obtaining a warrant. In this circumstance, you may use all information, data, photographs, samples, etc. gathered up to the point consent was withdrawn. You should make careful notes about what you did and saw up to that point so that any useful evidence you have collected may be used in a hearing, if necessary.

VIII. WARRANTS

As mentioned, the Supreme Court ruled in the Barlow case that the owner of a property, or his agent, could lawfully refuse entry to the representative of an agency seeking to conduct an inspection of the property without a search warrant.

The ruling was based on the fourth amendment to the Constitution, which guarantees freedom from unreasonable searches and seizures. The use of a warrant to gain entry to a facility to inspect is very rare; most inspections are conducted on the basis of consent. The next few sections may not apply directly to a new inspectors daily inspection duties, but were included to give a complete picture of the legal aspects of the NPDES inspection program. The Court ruled that there are three types of grounds for the issuance of a search warrant to be used for an inspection:

Reasons for Issuing a Warrant

A. Criminal probable cause, which requires proof that a crime probably has been committed.

B. Civil probable cause, which requires proof in a specific case that a civil wrong or violation has taken place.

C. Administrative probable cause, which requires proof that selection of the property to be inspected has been made pursuant to a "neutral inspection scheme."

Types of Warrants

These are two types of search warrants which may be issued, a

1. Criminal search warrant
2. Civil or administrative search warrant

A criminal search warrant will be sought in the cases of specific plants in which it is expected that Clean Water Act violations require criminal action under Section 309. A Regional attorney will have already become involved in the case before the warrant is sought. This type of warrant will be explained in more detail further on.

Administrative warrants, likewise, should never be sought for specific cases (violations) unless a Regional attorney has already become involved in the case. Administrative warrants are used when there is cause to believe that the Act or permit have been violated or there is an emergency situation, such as threats to public health and safety and it is anticipated that EPA will seek civil penalties or other relief for violations in a civil action in the Federal District Court.

Administrative warrants may also be used to inspect facilities where there are no known violations of the Act, yet information is needed to determine whether or not the permittee is in compliance. Obtaining a warrant under these circumstances will depend upon previously developed "neutral inspection plans."

Administrative Search Warrant

A. Administrative Search Warrant

In most NPDES inspections, the need for an administrative warrant will arise only after entry to a facility is refused. However, supervisors may decide to request a warrant without waiting for a refusal of entry. EPA and Department of Justice attorneys consider the following in deciding whether or not to apply for a warrant. These include:

Reasons to Seek Warrant in Advance

Administrative Warranc

1. The need for surprise. During the time required to obtain consensual entry,

evidence may be lost or destroyed.

2. Past performance. Past refusals of entry or similar uncooperative behavior may indicate that it will be futile to attempt a consensual entry.

3. The amount of delay that would later occur if a warrant becomes necessary. Lengthy travel time may be necessary to obtain the aid of a magistrate or a U.S. attorney.

For EPA inspections, administrative warrants should not be sought before an initial inspection unless cleared through Headquarters.

Obtaining the Warrant

B. Obtaining the Warrant

The administrative procedures for obtaining any type of search warrant are essentially the same. The application for a warrant cites the statutes and regulations pursuant to which the warrant is requested. The application also specifies, as clearly as possible, the premises to be inspected, and describes, very generally, how the search will be conducted. Finally, the application outlines the facts giving rise to probable cause and refers to the affidavit(s) supporting the application.

A supporting affidavit is a sworn statement describing in detail the facts necessary to justify the issuance of a search warrant. The person who signs the affidavit should have personal knowledge of all the facts presented, or should explain the source of hearsay that is used as a basis for the affidavit. After denial of entry, the inspector usually signs an affidavit. When there is not probable cause per se, an affidavit describing the neutral administrative plan and its applicability to the premises is signed by an EPA official. The thoroughness and truthfulness of an affidavit are critical.

Finally, a draft warrant is prepared and submitted for signature with the application and affidavit. The warrant orders an EPA inspector, U.S. Marshall, or other appropriate person to enter the property and conduct certain elements of an inspection. The instructions specified in the warrant should be broad enough to include all necessary and useful record copying, sample collecting and picture taking, but not so broad as to be rendered unclear by their vagueness.

After the warrant is signed by a judge or magistrate, the inspector to whom it is directed may proceed to execute its instructions. In many instances, the warrant will be directed to a U.S. Marshall whom the inspector will accompany. An entry refused in the face of a warrant may lead to forcible entry procedures or contempt of court charges. In executing the warrant, the inspector should scrupulously abide by its terms. If any articles are to be removed from the premises by the inspector, he must prepare an inventory of those articles and provide a receipt for them. After executing the warrant, the inspector must complete a return of service form with the name of the person who was served the warrant, date of service, and his own signature. The return of service form, executed warrant, and inventory, if any, are then returned to the issuing judge

Appendix F: Example of a Warrant

by the U.S. attorney (see Appendix F for an example of a warrant).

Criminal Search Warrant

C. Criminal Search Warrant

The Clean Water Act defines both civil and criminal violations. It is possible that an NPDES inspection might turn into a criminal investigation. This transition could have many legal effects on the way the inspection is conducted, on the way a case would be prosecuted, and on the penalties for conviction.

Criminal Acts

The violation of any condition or limitation in an NPDES permit is a civil violation. However, if the violation is either willful or negligent, it is a crime. Legally, a person's act is willful if it is done knowingly and intentionally.

Falsification of Information

Another type of crime defined in the Act is falsification of information. This crime is committed by any person who "knowingly makes any false statement, representation, or certification in any application, record, report, plan or other document filed or required to be maintained under this Act or who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this Act." If you have any reason to suspect criminal probable cause during the process of an investigation, contact the legal counsel in your Region for further instructions.

As discussed previously, the fourth amendment expresses the right to be free from unreasonable searches and seizures. The manner in which the courts protect this right is to disallow the use of evidence that was obtained illegally. A legal search to obtain evidence intended for use in a criminal prosecution requires the use of a criminal search warrant obtained under Rule 41 of the Federal Rules of Criminal Procedure.

By comparison, the requirements for obtaining an administrative warrant or a search warrant for civil prosecution are much less rigorous. This difference leads to a conflict; that is, whether evidence obtained by execution of a civil search warrant can be used in a criminal prosecution. Based on Marshall v Barlow's Inc. (98 S. Ct. 1816), Michigan v Tyler (98 S. Ct 1952), and U.S. v La Salle National Bank (57L. Ed. 2d 221), the crux of the issue is whether a criminal prosecution was anticipated before commencement of the search. If so, a criminal search warrant would have been required; and evidence obtained under a civil warrant would be inadmissible in a criminal prosecution. However, where only a civil prosecution is anticipated but evidence of a criminal violation is found in the course of executing a civil warrant, that evidence will be admissible in a criminal prosecution.

Burden of Proof

One last difference between a civil and criminal action also reflects the greater protection afforded persons subject to criminal prosecution. "Burden of proof" refers to the weight of evidence needed to prove in a trial that a person is guilty of a civil or criminal wrongdoing. A civil conviction requires only a simple preponderance of evidence. A criminal conviction requires showing evidence beyond a reasonable doubt. This difference in burden of proof affects inspectors only to the extent that they must be extremely thorough in gathering evidence to support a criminal case.

IX. GATHERING AND PRESERVING EVIDENCE

IX. GATHERING AND PRESERVING EVIDENCE

Inspections are conducted under the NPDES Program to ensure that permittees adhere to the terms of their permits. If a permittee does not adhere to these terms or misrepresents whether he is adhering to the terms, he may become subject to prosecution. Therefore, as described in previous sections of this course, the information gathered during inspections may be needed as evidence in the prosecution of court cases. Evidence consists of different kinds of materials used to establish facts, such as inspectors logbooks, which in turn support violations.

Sample Results as Evidence

The most frequently gathered information is derived from samples taken by the inspector. In order for the results of the analysis of these samples to be admissible as evidence, a logical and documented connection must be shown between samples taken and analytical results reported. This connection is shown by using any system that prevents the alteration, loss, mixture, or interchange of the samples between the time at which they were taken and the time at which they were analyzed. An effective system has three parts:

A. Each sample is labeled to uniquely identify it.

B. Each sample is kept securely closed between time of sampling and time of analysis to assure preservation of sample integrity.

C. An uninterrupted chain-of-custody is maintained.

The details regarding how an inspector should implement chain-of-custody during an inspection are outlined in the training module on Sampling. The legal pitfalls associated with the system deserve to be mentioned. First, labeling should follow a uniform policy. If individual inspectors make up their own sample code, the resulting confusion could disqualify the sample as evidence. Second, sample containers should be carefully selected and used. The method used to seal the containers (if the sample will be left unattended) should be capable of indicating if the seal has been breached. Finally, forms should accompany the sample and be signed by each person having custody of it. A sample is in custody as long as it is within your actual possession, within your range of view without interruption, or stored by you in an enclosed, secure area.

Photographs

Other physical evidence, such as photographs, are effective and admissible if properly identified by and supported with the testimony of the inspector who took them. As with all physical evidence, identification and proof of authenticity are crucial.

X. BASIS FOR TESTIMONY

X. BASIS FOR TESTIMONY

Testimonial evidence is not collected in the same sense as is physical evidence. However, an inspector's notes, either written or dictated on tape, can be used as a basis for presenting testimony later. It is important that the inspector record observations rather than opinions. While opinions may be admissible, only those opinions that you are qualified to express by training or other expertise may be admitted. The inspector should be able to reconstruct the investigation from the notes in his logbook.

XI. PRESENTING EVIDENCE FROM INSPECTION

XI. PRESENTING EVIDENCE FROM INSPECTIONS

The previous sections of this module have covered various aspects of the EPA inspector's role in conducting inspections and gathering evidence. This section focuses on the inspector's presentation of that evidence.

Admissibility of Evidence

A. Admissibility of Evidence

Evidence is subject to various rules of evidence, depending on the legal forum (State or Federal court) in which it is sought to be used and the type of proceeding (civil or criminal) in which it is to be used. However, certain general rules apply universally to the admissibility of evidence.

In order to ease the burden of presenting a case, some facts can be taken as true without proof. These fit into several categories:

1. Judicial notice. A court may recognize certain facts as common knowledge. For example, that 1 + 1 = 2 and that July 11, 1979, was a Wednesday.
2. Admissions in the pleadings. The parties in a case may admit the truth of certain facts in the written pleadings that they submit.

In the course of presenting evidence, documents are frequently used, including permit forms, laboratory analysis reports, letters, written contracts, and deeds.

For many official Government documents there is a statute that provides for a custodian to keep the documents and to certify their authenticity.

Serving as a Witness

B. Serving as a Witness

The inspector is a witness when he signs an affidavit supporting an application for a search warrant. The inspector's role may require him to provide information in a case, even before the case comes to trial. The inspector may be called upon to provide information to answer the opposing party's interrogatories with his deposition. This is known as the process of discovery, during which the opposing party, within the rules governing civil procedure, allow the opposing party to obtain information. Of course, he should always tell the truth; but he should also remember that this deposition may be used against him during cross-examination.

Giving testimony at a trial involves substantial prior preparation. The witness should go over his testimony carefully and be made aware of the questions he will be asked on the stand by the attorney. There should be no surprises. If, during cross-examination, the witness is asked, "Did you and your attorney talk about how you would answer the questions?", the inspector should have no qualms about saying yes. Be sure to listen to the exact words raised by counsel. If the question is "Did your lawyer tell you what to say?", the answer may be different. In addition, a witness should not only be familiar with the case and questions, but should have some practice in a courtroom format. A mock trial, including cross-examination, would be a very useful exercise.

The Inspector as a Witness on the stand

Once on the stand, the witness should speak loudly and clearly enough to be heard. If you need time to think or recollect before answering a question, you should take it. The inspector should face the judge to answer any questions he may be asked. The witness should answer only the question asked, not volunteer answers. If a yes-no question is asked but neither is an appropriate answer, you should say so. If you do not understand or cannot remember an entire question, you should say so. If you notice that you have made an error, you should correct yourself as soon as possible. If you do not know the answer to a question, you should say so. If you need notes to recall some of your testimony or to answer a question, request the courts permission to refer to them and remember that opposing counsel has a right to see them. You should not start answering until a question is finished and should stop answering a question as soon as an objection is raised.

Cross-examination

The main consideration during cross-examination is to stay calm. The opposing attorney may try to cast doubt on what the witness has said. The witness should not get angry or be flippant. He should listen carefully to each question and watch out for purposeful misquotes of what he has said. If he becomes uncomfortable, he should not look at his attorney as if he expects to be rescued.

Normally, the testimony of a witness will consist of facts. However, an expert witness may also give opinions because he has specialized expertise in a given subject. An expert witness must first be established or "qualified." His education and experience are described, and he may be cross-examined about his qualifications.

His opinion is obtained by asking him hypothetical questions that relate to the facts of the case.

XII. LIABILITIES

XII. LIABILITIES

EPA representatives should be aware that, in acting as inspectors or witnesses, some legal liabilities may arise. While inspecting, the inspector is an agent of EPA and is generally safe from liability. However, problems occur if an inspector does not stay within the limits of his authority as an EPA inspector during an inspection. He may then become personally liable for all of his actions. One of these limits is that an inspector identify himself properly. His EPA I.D. protects him only if he presents it. The agent might also lose his status if he exceeds the scope of his agency by acts such as threatening a permittee, using force to enter premises, or accepting renumeration from a permittee.

On the stand as a witness, some liabilities may arise but only through very foolish, overt acts by the witness. Intentional lying under oath could subject a witness to prosecution for perjury. Disturbing the court could make the witness liable for contempt.

XIII. SUMMARY

XII. SUMMARY

In summary, most laws affecting the inspector working within the NPDES Program are contained in the Clean Water Act or in the NPDES Regulations. Under the Act, inspectors, as agents of the Administrator of EPA, may enter the premises of permittees and conduct inspections. Before entry or after refusal of entry, the use of a warrant may be necessary. The fourth and fifth amendments, as well as certain procedural principles, protect the rights of the permittees being inspected, especially when the inspection becomes a criminal investigation.

The information gathered during an inspection may be used as evidence in prosecuting a civil or criminal case if the evidence is collected and preserved properly, and if it is relevant and material.

Serving as a witness is primarily a matter of careful preparation and calm, collected testifying. Serving as an expert witness on a specific subject allows the witness, once qualified, to express an opinion on that subject.

Finally, an EPA employee who serves as an inspector or a witness is legally secure as long as he does not greatly deviate from established procedures.

APPENDIX A - MARSHALL V. BARLOW'S DECISION

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

11 APR 1979

OFFICE OF ENFORCEMENT

MEMORANDUM

TO: Deputy Assistant Administrators for Enforcement

FROM: Assistant Administrator for Enforcement

SUBJECT: Development of Neutral Administrative Inspection Schemes

It is essential that all enforcement programs develop, as soon as possible, neutral schemes for the conduct of all inspections. This requirement is mandated by the decision of the Supreme Court in Marshall v. Barlow's, Inc., U. S. , 98 S. Ct. 1816 (1978). As you know, the Barlow's decision addressed the issue of the need for and use of warrants in conducting administrative inspections under various regulatory schemes. The Court stated, in general, that a warrant was necessary when requested by the owner or person-in-charge of the establishment to be inspected, but that the warrant need not be based on a showing of criminal probable cause. Rather, a warrant would be issued if it could be shown that the establishment was being inspected pursuant to a neutral administrative scheme.

The Department of Justice and the Office of General Counsel agree that there is an urgent need for each compliance monitoring program to develop a neutral administrative scheme for inspections, and that such schemes must be put into writing. If the schemes are not documented until an inspection warrant is sought, they will appear to be post hoc rationalizations for ill-conceived or harassing inspectional programs and will not be favored by the courts.

I believe that most of our compliance monitoring programs have developed inspection programs which utilize neutral criteria. In some instances, however, the total neutral scheme for each program has not been formally documented. Examples of neutral criteria which could satisfy the requirements of Barlow's are random selection; inspecting all or a fixed percentage of certain types of facilities on an annual basis; ranking inspections by the amount of controlled chemical substances manufactured, processed or distributed in commerce; re-inspection of establishments which exhibited prior violations; and other reasonable factors that show that the establishment being inspected has not been selected for any arbitrary or invidious reason. The Office of General Counsel will cooperate with the Office of Enforcement in assuring that the neutral administrative schemes developed by each program are compatible with the Barlow's decision.

APPENDIX A
(Page 2 of 11)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

11 APR 1979

MEMORANDUM

OFFICE OF ENFORCEMENT

TO: Regional Administrators
Surveillance and Analysis Division Directors
Enforcement Division Directors

FROM: Assistant Administrator
for Enforcement

SUBJECT: Conduct of Inspections After the Barlow's Decision

I. Summary

This document is intended to provide guidance to the Regions in the conduct of inspections in light of the recent Supreme Court decision in Marshall v. Barlow's, Inc., ____U.S.____, 98 S. Ct. 1816 (1978). The decision bears upon the need to obtain warrants or other process for inspections pursuant to EPA-administered Acts.

In Barlow's, the Supreme Court held that an OSHA inspector was not entitled to enter the non-public portions of a work site without either (1) the owner's consent, or (2) a warrant. The decision protects the owner against any penalty or other punishment for insisting upon a warrant.

In summary, Barlow's should only have a limited effect on EPA enforcement inspections:

- Inspections will generally continue as usual;
- Where an inspector is refused entry, EPA will seek a warrant through the U.S. Attorney;
- Sanctions will not be imposed upon owners of establishments who insist on a warrant before allowing inspections of the non-public portions of an establishment.

The scope of the Barlow's decision is broad. It affects all current inspection programs of EPA, including inspections conducted by State personnel and by contractors. The Agency's procedures for inspections, particularly where entry is denied, were largely in accord with the provisions of Barlow's before the Supreme Court issued its ruling. Nevertheless, a number of changes in Agency procedure are warranted. Thus, it is important that all personnel involved in the inspection process be familiar with the procedural guidelines contained in this document.

This document focuses on the preparation for and conduct of inspections, including (1) how to proceed when entry is denied, (2) under what circumstances a warrant is necessary, and (3) what showing is necessary to obtain a warrant.

II. Conduct of Inspections

The following material examines the procedural aspects of conducting inspections under EPA-administered Acts. Inspections are considered in three stages: (1) preparation for inspection of premises, (2) entry onto premises, and (3) procedures to be followed where entry is refused.

A. Preparation

Adequate preparation should include consideration of the following factors concerning the general nature of warrants and the role of personnel conducting inspections.

(1) Seeking a Warrant Before Inspection

The Barlow's decision recognized that, on occasion, the Agency may wish to obtain a warrant to conduct an inspection even before there has been any refusal to allow entry. Such a warrant may be necessary when surprise is particularly crucial to the inspection, or when a company's prior bad conduct and prior refusals make it likely that warrantless entry will be refused. Pre-inspection warrants may also be obtained where the distance to a U.S. Attorney or a magistrate is considerable so that excessive travel time would not be wasted if entry were denied.
At present, the seeking of such a warrant prior to an initial inspection should be an exceptional circumstance, and should be cleared through Headquarters. If refusals to allow entry without a warrant increase, such warrants may be sought more frequently. (For specific instructions on how to obtain a warrant, see Part D.)

(2) Administrative Inspections v. Criminal Investigations

It is particularly important for both inspectors and attorneys to be aware of the extent to which evidence sought in a civil inspection can be used in a criminal matter, and to know when it is necessary to secure a criminal rather than a civil search warrant. There are three basic rules to remember in this regard: (1) If the purpose of the inspection is to discover and correct, through civil procedures, noncompliance with regulatory requirements, an administrative inspection (civil) warrant may be used; (2) if the inspection is in fact intended, in whole or in part, to gather evidence for a possible criminal prosecution, a criminal search warrant must be obtained under Rule 41 of the Federal Rules of Criminal Procedure; and (3) evidence obtained during a valid civil inspection is generally admissible in criminal proceedings. These principles arise from the recent Supreme Court cases of Marshall v. Barlow's, Inc., supra; Michigan v. Tyler, ____U.S.____, 98 S.Ct. 1942 (1978); and U.S. v. LaSalle National Bank, ____U.S.____, 57 L. Ed. 2d 221 (1978). It is not completely clear whether a combined investigation for civil and criminal violations may be properly conducted under a civil or "administrative" warrant, but we believe that a civil warrant can properly be used unless the intention is clearly to conduct a criminal investigation.

(3) The Use of Contractors to Conduct Inspections

Several programs utilize private contractors to aid in the conduct of inspections. Since, for the purpose of inspections, these contractors are agents of the Federal government, the restrictions of the Barlow's decision also apply to them. If contractors are to be conducting inspections without the presence of actual EPA inspectors, these contractors should be given training in how to conduct themselves when entry is refused. With respect to obtaining or executing a warrant, an EPA inspector should always participate in the process, even if he was not at the inspection where entry was refused.

(4) Inspections Conducted by State Personnel

The Barlow's holding applies to inspections conducted by State personnel and to joint Federal/State inspections. Because some EPA programs are largely implemented through the States, it is essential that the Regions assure that State-conducted inspections are conducted in compliance with the Barlow's decision, and encourage the State inspectors to consult with their legal advisors when there is a refusal to allow entry for inspection purposes. State personnel should be encouraged to contact the EPA Regional Enforcement Office when any questions concerning compliance with Barlow's arise.

With regard to specific procedures for States to follow, the important points to remember are: (1) The State should not seek forcible entry without a warrant or penalize an owner for insisting upon a warrant, and (2) the State legal system should provide a mechanism for issuance of civil administrative inspection warrants. If a State is enforcing an EPA program through a State statute, the warrant process should be conducted through the State judicial system. Where a State inspector is acting as a contractor to the Agency, any refusal to allow entry should be handled as would a refusal to an Agency inspector as described in section II.B.3. Where a State inspector is acting as a State employee with both Federal and State credentials, he should utilize State procredures unless the Federal warrant procedures are more advantageous, in which case, the warrant should be sought under the general procedures described below. The Regions should also assure that all States which enforce EPA programs report any denials of entry to the appropriate Headquarters Enforcement Attorney for the reasons discussed in section II.B.4.

B. Entry

(1) Consensual Entry

One of the assumptions underlying the Court's decision is that most inspections will be consensual and that the administrative inspection framework will thus not be severely disrupted. Consequently, inspections will normally continue as before the Barlow's decision was issued. This means that the inspector will not normally secure a warrant before undertaking an inspection but, in an attempt to gain admittance, will present his credentials and issue a notice of inspection where required. The establishment owner may complain about allowing an inspector to enter or otherwise express his displeasure with EPA or the Federal government. However, as long as he allows the inspector to enter, the entry is voluntary and consensual unless the inspector is expressly told to leave the premises. On the other hand, if the inspector has gained entry in a coercive manner (either in a verbal or physical sense), the entry would not be consensual.

Consent must be given by the owner of the premises or the person in charge of the premises at the time of the inspection. In the absence of the owner, the inspector should make a good faith effort to determine who is in charge of the establishment and present his credentials to that person. Consent is generally needed only to inspect the non-public portions of an establishment - i.e., any evidence that an inspector obtains while in an area open to the public is admissible in an enforcement proceeding.

(2) Withdrawal of Consent

The owner may withdraw his consent to the inspection at any time. The inspection is valid to the extent to which it has progressed before consent was withdrawn. Thus, observations by the inspector, including samples and photographs obtained before consent was withdrawn, would be admissible in any subsequent enforcement action. Withdrawal of consent is tantamount to a refusal to allow entry and should be treated as discussed in section II.B.3. below, unless the inspection had progressed far enough to accomplish its purposes.

(3) When Entry is Refused

Barlow's clearly establishes that the owner does have the right to ask for a warrant under normal circumstances.[1] Therefore, refusal to allow entry for inspectional purposes will not lead to civil or criminal penalties if the refusal is based on the inspector's lack of a warrant and one of the exemptions discussed in Part C does not apply. If the owner were to allow the inspector to enter his establishment only in response to a threat of enforcement liability, it is quite possible that any evidence obtained in such an inspection would be inadmissible. An inspector may, however, inform the owner who refuses entry that he intends to seek a warrant to compel the inspection. In any event, when entry is refused, the inspector should leave the premises immediately and telephone the designated Regional Enforcement Attorney as soon as possible for further instructions. The Regional Enforcement Attorney should contact the U.S. Attorney's Office for the district in which the establishment desired to be inspected is located and explain to the appropriate Assistant United States Attorney the need for a warrant to conduct the particular inspection. The Regional Attorney should arrange for the United States Attorney to meet with the inspector as soon as possible. The inspector should bring a copy of the appropriate draft warrant and affidavits. Samples are provided in the appendix to this document.

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[1] FIFRA inspections are arguably not subject to this aspect of Barlow's See discussion, p. 5 and 6.

(4) Headquarters Notification

It is essential that the Regions keep Headquarters informed of all refusals to allow entry. The Regional Attorney should inform the appropriate Headquarters Enforcement Attorney of any refusals to enter and should send a copy of all papers filed to Headquarters. It is necessary for Headquarters to monitor refusals and Regional success in obtaining warrants to evaluate the need for improved procedures and to assess the impact of Barlow's on our compliance monitoring programs.

C. Areas Where a Right of Warrantless Entry Still Exists

1. Emergency Situations.

In an emergency, where there is no time to get a warrant, a warrantless inspection is permissible. In Camara v. Municipal Court, 387 U.S. 523 (1967), the Supreme Court states that "nothing we say today is intended to foreclose prompt inspections, even without a warrant, that the law has traditionally upheld in emergency situations". Nothing stated in Barlow's indicates any intention by the court to retreat from this position. The Regions will always have to exercise considerable judgment concerning whether to secure a warrant when dealing with an emergency situation. However, if entry is refused during an emergency, the Agency would need the assistance of the U.S. Marshal to gain entry, and a warrant could probably be obtained during the time necessary to secure that Marshal's assistance.

An emergency situation would include potential imminent hazard situations, as well as, situations where there is potential for destruction of evidence or where evidence of a suspected violation may disappear during the time that a warrant is being obtained.

(2) FIFRA Inspections.

There are some grounds for interpreting Barlow's as not being applicable to FIFRA inspections. The Barlow's restrictions do not apply to areas that have been subject to a long standing and pervasive history of government regulation. An Agency administrative law judge held recently that even after the Barlow's decision, refusal to allow a warrantless inspection of a FIFRA regulated establishment properly subjected the owner to civil penalty. N. Jonas & Co., Inc., I.F. & R Docket No. III-121C (July 27, 1978). For the present, however, FIFRA inspections should be conducted under the same requirements applicable to other enforcement programs.

(3) "Open Fields" and "In Plain View" situations.

Observation by inspectors of things that are in plain view, (i.e., of things that a member of the public could be in a position to observe) does not require a warrant. Thus, an inspector's observations from the public area of a plant or even from certain private property not closed to the public are admissible. Observations made even before presentation of credentials while on private property which is not normally closed to the public are admissible.

D. Securing a Warrant

There are several general rules for securing warrants. Three documents have to be drafted: (a) an application for a warrant, (b) an accompanying affidavit, and (c) the warrant itself. Each document should be captioned with the District Court of jurisdiction, the title of the action, and the title of the particular document.

The application for a warrant should generally identify the statutes and regulations under which the Agency is seeking the warrant, and should clearly identify the site or establishment desired to be inspected (including, if possible, the owner and/or operator of the site). The application can be a one or two page document if all of the factual background for seeking the warrant is stated in the affidavit, and the application so states. The application should be signed by the U.S. Attorney or by his Assistant U.S. Attorney.

The affidavits in support of the warrant application are crucial documents. Each affidavit should consist of consecutively numbered paragraphs, which describe all of the facts that support warrant issuance. If the warrant is sought in the absence of probable cause, it should recite or incorporate the neutral administrative scheme which is the basis for inspecting the particular establishment. Each affidavit should be signed by someone with personal knowlege of all the facts stated. In cases where entry has been denied, this person would most likely be the inspector who was denied entry. Note that an affidavit is a sworn statement that must either by notarized or personally sworn to before the magistrate.

The warrant is a direction to an appropriate official (an EPA inspector, U.S. Marshal or other Federal officer) to enter a specifically described location and perform specifically described inspection functions. Since the inspection is limited by the terms of the warrant, it is important to specify to the broadest extent possible the areas that are intended to be inspected, any records to be inspected, any samples to be taken, any articles to be seized, etc. While a broad warrant may be permissible in civil administrative inspections, a vague or overly broad warrant will probably not be signed by the magistrate and may prove susceptible to constitutional challenge The draft warrant should be ready for the magistrate's signature at the time of submission via a motion to quash and suppress evidence in Federal District court. Once the magistrate signs the draft warrant, it is an enforceable document. Either following the magistrate's signature or on a separate page, the draft warrant should contain a "return of service" or "certificate of service". This portion of the warrant should indicate upon whom the warrant was personally served and should be signed and dated by the inspector. As they are developed, more specific warrant-issuance documents will be drafted and submitted to the Regions.

E. Standards or Bases for the Issuance of Administrative Warrants.

The Barlow's decision establishes three standards or bases for the issuance of administrative warrants. Accordingly, warrants may be obtained upon a showing: 1) of traditional criminal probable cause, 2) of civil probable cause, or 3) that the establishment was selected for inspection pursuant to a neutral administrative inspection scheme.

1. Civil specific probable cause warrant.

Where there is some specific probable cause for issuance of a warrant such as an employee complaint or competitor's tip, the inspector should be prepared to describe to the U.S. Attorney in detail the basis for this probable cause.

The basis for probable cause will be stated in the affidavit in support of the warrant. This warrant should be used when the suspected violation is one that would result in a civil penalty or other civil action.

2. Civil probable cause based on a neutral administrative inspection scheme.

Where there is no specific reason to think that a violation has been committed, a warrant may still be issued if the Agency can show that the establishment is being inspected pursuant to a neutral administrative scheme. As the Supreme Court stated in Barlow's:

> "Probable cause in the criminal law sense is not required. For purposes of an administrative search, such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation, but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]". A warrant showing that a specific business has been chosen for an OSHA search on the basis of a general administrative plan for the enforcement of the act derived from neutral sources such as, for example, dispersion of employees in various type of industries across a given area, and the desired frequency of searches in any of the lesser divisions of the area, would protect an employers Fourth Amendment rights."

Every program enforced by the Agency has such a scheme by which it prioritizes and schedules its inspections. For example, a scheme under which every permit holder in a given program is inspected on an annual basis is a satisfactory neutral administrative scheme. Also, a scheme in which one out of every three known PCB transformer repair shops is inspected on an annual basis is satisfactory, as long as, neutral criteria such as random selection are used to select the individual establishment to be inspected. Headquarters will prepare and transmit to the Regions the particular neutral administrative scheme under which each program's inspections are to be conducted. Inspections not based on specific probable cause must be based on neutral administrative schemes for a warrant to be issued. Examples of two neutral administrative schemes are provided in the appendix. (Attachments II and III)

The Assistant U.S. Attorney will request the inspector to prepare and sign an affidavit that states the facts as he knows them. The statement should include the sequence of events culminating in the refusal to allow entry and a recitation of either the specific probable cause or the neutral administrative scheme which led to the particular establishment's selection for inspection. The Assistant U.S. Attorney will then present a request for an inspection warrant, a suggested warrant, and the inspector's affidavit to a magistrate or Federal district court judge.[2]

3. Criminal Warrants.

Where the purpose of the inspection is to gather evidence for a criminal prosecution, the inspector and the Regional Attorney should request that the U.S. Attorney seek a criminal warrant under Rule 41 of the Federal Rules of Criminal Procedure. This requires a specific showing of probable cause to believe that evidence of a crime will be discovered. Agency policy on the seeking of criminal warrants has not been affected by Barlow's. The distinction between administrative inspections and criminal warrant situations is discussed in Section II.A.2.

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[2] The Barlow's decision states that imposing the warrant requirement on OSHA would not invalidate warrantless search provisions in other regulatory statutes since many such statutes already "envision resort

F. Inspecting with a Warrant

Once the warrant has been issued by the magistrate or judge, the inspector may proceed to the establishment to commence or continue the inspection. Where there is a high probability that entry will be refused even with a warrant or where there are threats of violence, the inspector should be accompanied by a U.S. Marshal when he goes to serve the warrant on the recalcitrant owner. The inspector should never himself attempt to make any forceful entry of the establishment. If the owner refuses entry to an inspector holding a warrant but not accompanied by a U.S. Marshal, the inspector should leave the establishment and inform the Assistant U.S. Attorney and the designated Regional Attorney. They will take appropriate action such as seeking a citation for contempt. Where the inspector is accompanied by a U.S. Marshal, the Marshal is principally charged with executing the warrant. Thus, if a refusal or threat to refuse occurs, the inspector should abide by the U.S. Marshal's decision whether it is to leave, to seek forcible entry, or otherwise.

The inspector should conduct the inspection strictly in accordance with the warrant. If sampling is authorized, the inspector must be sure to carefully follow all procedures, including the presentation of receipts for all samples taken. If records or other property are authorized to be taken, the inspector must receipt the property taken and maintain an inventory of anything taken from the premises. This inventory will be examined by the magistrate to assure that the warrant's authority has not been exceeded.

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2 continued from page 8.

to Federal court enforcement when entry is refused". There is thus some question as to whether the existence of a non-warrant Federal court enforcement mechanism in a statute requires the use of that mechanism rather than warrant issuance. We believe that the Barlow's decision gives the agency the choice of whether to proceed through warrant issuance or through an application for an injunction, since the decision is largely based on the fact that a warrant procedure imposes virtually no burden on the inspecting agency. In addition, an agency could attempt to secure a warrant prior to inspection on an ex parte basis, something not available under normal injunction proceedings. Several of the acts enforced by EPA have provisions allowing the Administrator to seek injunctive relief to assure compliance with the various parts of a particular statute. There may be instances where it would be more appropriate to seek injunctive relief to gain entry to a facility than to attempt to secure a warrant for inspection, although at this point we cannot think of any. However, since the warrant process will be far more expeditious than the seeking of an injunction, any decision to seek such an injunction for inspection purposes should be cleared through appropriate Headquarters staff.

G. Returning the Warrant.

After the inspection has been completed, the warrant must be returned to the magistrate. Whoever executes the warrant, (i.e., whoever performs the inspection), must sign the return of service form indicating to whom the warrant was served and the date of service. He should then return the executed warrant to the U.S. Attorney who will formally return it to the issuing magistrate or judge. If anything has been physically taken from the premises, such as records or samples, an inventory of such items must be submitted to the court, and the inspector must be present to certify that the inventory is accurate and complete.

III. Conclusion

Except for requiring the Agency to formalize its neutral inspection schemes, and for generally ending the Agency's authority for initiating civil and/or criminal actions for refusal to allow warrantless inspections, Barlow's should not interfere with EPA enforcement inspections.

Where there is doubt as to how to proceed in any entry case, do not hesitate to call the respective Headquarters program contact for assistance.

Marvin B. Durning
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APPENDIX B - SECTIONS OF THE CLEAN WATER ACT RELEVANT TO NPDES INSPECTORS

FEDERAL WATER POLLUTION CONTROL ACT, AS AMENDED BY CLEAN WATER ACT OF 1977

(Commonly Referred to as Clean Water Act)

(33 U.S.C. 1251, *et seq.*, PL 92-500; Enacted by Congress October 18, 1972, Overriding the President's Veto of October 17, 1972, as amended by PL 93-207, December 28, 1973, and PL 93-243, January 2, 1974; PL 93-592, January 2, 1975; PL 94-238, March 23, 1976; PL 94-558, October 19, 1976; PL 95-217, December 28, 1977).

[*Editor's note*: The Federal Water Pollution Control Act Amendments of 1972, PL 92-500, replaced the previous language of the Act entirely, including the Water Quality Act of 1965, the Clean Water Restoration Act of 1966, and the Water Quality Improvement Act of 1970, all of which had been amendments of the Federal Water Pollution Control Act first passed in 1956. The 1977 amendments, PL 95-217, further amended PL 92-500.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—RESEARCH AND RELATED PROGRAMS

DECLARATION OF GOALS AND POLICY

Sec. 101. (a) The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.

(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this Act. It is the policy of Congress that the States manage the construction grant program under this Act and implement the permit programs under sections 402 and 404 of this Act. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Except as otherwise expressly provided in this Act, the Administrator of the Environmental Protection Agency (hereinafter in this Act called "Administrator") shall administer this Act.

(e) Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this Act shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) It is the national policy that to the maximum extent possible the procedures utilized for implementing this Act shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to such publicly owned treatment works may be revised by the owner or operator of such works to reflect the removal of such toxic pollutant by such works."

(2) The Administrator shall, from time to time, as control technology, processes, operating methods, or other alternative change, revise such standards following the procedure established by this subsection for promulgation of such standards.

(3) When proposing or promulgating any pretreatment standard under this section, the Administrator shall designate the category or categories of sources to which such standard shall apply.

(4) Nothing in this subsection shall affect any pretreatment requirement established by any State or local law not in conflict with any pretreatment standard established under this subsection.

(c) In order to insure that any source introducing pollutants into a publicly owned treatment works, which source would be a new source subject to section 306 if it were to discharge pollutants, will not cause a violation of the effluent limitations established for any such treatment works, the Administrator shall promulgate pretreatment standards for the category of such sources simultaneously with the promulgation of standards of performance under section 306 for the equivalent category of new sources. Such pretreatment standards shall prevent the discharge of any pollutant into such treatment works, which pollutant may interfere with, pass through, or otherwise be incompatible with such works.

(d) After the effective date of any effluent standard or prohibition or pretreatment standard promulgated under this section, it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.

INSPECTIONS, MONITORING AND ENTRY

Sec. 308. (a) Whenever required to carry out the objective of this Act, including but not limited to (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this Act; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections 305, 311, 402, 404 (relating to State permit programs), and 504 of this Act—

(A) the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require; and

(B) the Administrator or his authorized representative, upon presentation of his credentials—

(i) shall have a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and

(ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under clause (A), and sample any effluents which the owner or operator of such source is required to sample under such clause.

(b) Any records, reports, or information obtained under this section (1) shall, in the case of effluent data, be related to any applicable effluent limitations, toxic, pretreatment, or new source performance standards, and (2) shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof (other than effluent data), to which the Administrator has access under this section, if made public would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information, or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18 of the United States Code, except that such record, report, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this Act or when relevant [illegible] any proceeding under this Act.

(c) Each State may develop and submit to the Administrator procedures under State law for inspection, monitoring, and entry with respect to point sources located in such State. If the Administrator finds that the procedures and the law of any State relating to inspection, monitoring, and entry are applicable to at least the same extent as those required by this section, such State is authorized to apply and enforce its procedures for inspection, monitoring, and entry with respect to point sources located in such State (except with respect to point sources owned or operated by the United States).

FEDERAL ENFORCEMENT

Sec. 309. (a) (1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 301, 302, 306, 307, 308, 318, or 405 of this Act in a permit issued by a State under an approved permit program under section 402 or 404 of this Act, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil act in accordance with subsection (b) of this section.

(2) Whenever, on the the basis of information avail-

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April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable-water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations or requirements, or water quality criteria, and shall, when requested by any such department or agency or State or interstate agency, or applicant, comment on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 301 or 302 of this Act, standard of performance under section 306 of this Act, or prohibition, effluent standard, or pretreatment standard under section 307 of this Act, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section.

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

Sec. 402. (a) (1) Except as provided in sections 318 and 404 of this Act, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301 (a), upon condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 13 of the Act of March 3, 1899, shall be deemed to be permits issued under this title, and permits issued under this title shall be deemed to be permits issued under section 13 of the Act of March 3, 1899, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this Act.

(5) No permit for a discharge into the navigable waters shall be issued under section 13 of the Act of March 3, 1899, after the date of enactment of this title. Each application for a permit under section 13 of the Act of March 3, 1899, pending on the date of enactment of this Act shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objective of this Act, to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on the date of enactment of this Act and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 304 (h) (2) of this Act, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each such permit shall be subject to such conditions as the Administrator determines are necessary to carry out the provisions of this Act. No such permit shall issue if the Administrator objects to such issuance.

(b) At any time after the promulgation of the guidelines required by subsection (h) (2) of section 304 of this Act, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall ap-

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monitoring device or method required to be maintained under this Act, shall upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

(3) For the purposes of this subsection, the term "person" shall mean, in addition to the definition contained in section 502(5) of this Act, any responsible corporate officer.

(d) Any person who violates section 301, 302, 306, 307, 308, 318, or 405 of this Act, or any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by the Administrator, or by a State, or in a permit issued under section 404 of this Act by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

(e) Whenever a municipality is a party to a civil action brought by the United States under this section, the State in which such municipality is located shall be joined as a party. Such State shall be liable for payment of any judgment, or any expenses incurred as a result of complying with any judgment, entered against the municipality in such action to the extent that the laws of that State prevent the municipality from raising revenues needed to comply with such judgment.

(f) Whenever, on the basis of an information available to him, the Administrator finds that an owner or operator of any source is introducing a pollutant into a treatment works in violation of subsection (d) of section 307, the Administrator may notify the owner or operator of such treatment works and the State of such violation. If the owner or operator of the treatment works does not commence appropriate enforcement action within 30 days of the date of such notification, the Administrator may commence a civil action for appropriate relief, including but not limited to, a permanent or temporary injunction, against the owner or operator of such treatment works. In any such civil action the Administrator shall join the owner or operator of such source as a party to the action. Such action shall be brought in the district court of the United States in the district in which the treatment works is located. Such court shall have jurisdiction to restrain such violation and to require the owner or operator of the treatment works and the owner or operator of the source to take such action as may be necessary to come into compliance with this Act. Notice of commencement of any such action shall be given to the State. Nothing in this subsection shall be construed to limit or prohibit any other authority the Administrator may have under this Act.

INTERNATIONAL POLLUTION ABATEMENT

Sec. 310. (a) Whenever the Administrator, upon receipts of reports, surveys, or studies from any duly constituted international agency, has reason to believe that pollution is occurring which endangers the healt or welfare of persons in a foreign country, and t Secretary of State requests him to abate such pollution, he shall give formal notification thereof to the State water pollution control agency of the State or States in which such discharge or discharges originate and to the appropriate interstate agency, if any. He shall also promptly call such a hearing, if he believes that such pollution is occurring in sufficient quantity to warrant such action, and if such foreign country has given the United States essentially the same rights with respect to the prevention and control of pollution occurring in that country as is given that country by this subsection. The Administrator, through the Secretary of State, shall invite the foreign country which may be adversely affected by the pollution to attend and participate in the hearing, and the representative of such country shall, for the purpose of the hearing and any further proceeding resulting from such hearing, have all the rights of a State water pollution control agency. Nothing in this subsection shall be construed to modify, amend, repeal, or otherwise affect the provisions of the 1909 Boundary Waters Treaty between Canada and the United States or the Water Utilization Treaty of 1944 between Mexico and the United States (59 Stat. 1219), relative to the control and abatement of pollution in waters covered by those treaties.

(b) The calling of a hearing under this section shall not be construed by the courts, the Administrator, any person as limiting, modifying, or otherwise affe ing the functions and responsibilities of the Administrator under this section to establish and enforce water quality requirements under this Act.

(c) The Administrator shall publish in the Federal Register a notice of a public hearing before a hearing board of five or more persons appointed by the Administrator. A majority of the members of the board and the chairman who shall be designated by the Administrator shall not be officers or employees of Federal, State, or local governments. On the basis of the evidence presented at such hearing, the board shall within sixty days after completion of the hearing make findings of fact as to whether or not such pollution is occurring and shall thereupon by decision, incorporating its findings therein, make such recommendations to abate the pollution as may be appropriate and shall transmit such decision and the record of the hearings to the Administrator. All such decisions shall be public. Upon receipt of such decision, the Administrator shall promptly implement the board's decision in accordance with the provisions of this Act.

(d) In connection with any hearing called under this subsection, the board is authorized to require any person whose alleged activities result in discharges causing or contributing to pollution to file with it in such form as it may prescribe, a report based on existing da furnishing such information as may reasonably be r quired as to the character, kind, and quantity of such

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tions and conditions which such permit would include if it were issued by the Administrator.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(4) In any case where, after the date of enactment of this paragraph, the Administrator, pursuant to paragraph (2) of this subsection, objects to the issuance of a permit, or request of the State, a public hearing shall be held by the Administrator on such objection. If the State does not resubmit such permit revised to meet such objection within 30 days after completion of the hearing, or, if no hearing is requested within 90 days after the date of such objection, the Administrator may issue the permit pursuant to subsection (a) of this section for such source in accordance with the guidelines and requirements of this Act.

(e) In accordance with guidelines promulgated pursuant to subsection (h) (2) of section 304 of this Act, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the Department in which the Coast Guard is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) In the event any condition of a permit for discharges from a treatment works (as defined in section 212 of this Act) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved or where the Administrator determines pursuant to section 309(a) of this Act that a State with an approved program has not commenced appropriate enforcement action with respect to such permit, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

(i) Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 309 of this Act.

(j) A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 309 and 505, with sections 301, 302, 306, 307, and 403, except any standard imposed under section 307 for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 301, 306, and 402, of this Act, or (2) section 13 of the Act of March 3, 1899, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date of enactment which source is not subject to section 13 of the Act of March 3, 1899, the discharge by such source shall not be a violation of this Act if such a source applies for a permit for discharge pursuant to this section within such 180-day period.

(l) The Administrator shall not require a permit under this section, for discharge composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.

[*Editor's note:* SEC. 54(c) (2) of the Clean Water Act of 1977 says:

"Any State permit program approved under section 402 of the Federal Water Pollution Control Act before the date of enactment of the Clean Water Act of 1977, which requires modification to conform to the amendment made by paragraph (1) of this subsection, shall not be required to be modified before the end of the one year period which begins on the date of enactment of the Clean Water Act of 1977 unless in order to make the required modification a State must amend or enact a law in which case such modification shall not be required for such State before the end of the two year period which begins on such date of enactment."]

OCEAN DISCHARGE CRITERIA

Sec. 403. (a) No permit under section 402 of this Act for a discharge into the territorial sea, the waters of the contiguous zone, or the oceans shall be issued, after promulgation of guidelines established under subsection (c) of this section, except in compliance with such guidelines. Prior to the promulgation of such guidelines, a permit may be issued under such section 402 if the Administrator determines it to be in the public interest.

(b) The requirements of subsection (d) of section 402 of this Act may not be waived in the case of permits for discharges into the territorial sea.

(c) (1) The Administrator shall, within one hundred and eighty days after enactment of this Act (and from

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ments of subsections (b) (1) (A) and (C) of this section and shall contain such other terms and conditions, including pretreatment and interim effluent limitations and water conservation requirements applicable to that point source, as the Administrator determines are necessary to carry out the provisions of this Act.

(B) No time modification granted by the Administrator (or if appropriate the State) pursuant to paragraph (2) (A) of this subsection shall extend beyond the earliest date practicable for compliance or beyond the date of any extension granted to the appropriate publicly owned treatment works pursuant to paragraph (1) of this subsection, but in no event shall it extend beyond July 1, 1983; and no such time modification shall be granted unless (i) the publicly owned treatment works will be in operation and available to the point source before July 1, 1983, and will meet the requirements to subsections (b) (1) (B) and (C) of this section after receiving the discharge from that point source; and (ii) the point source and the publicly owned treatment works have entered into an enforceable contract requiring the point source to discharge into the publicly owned treatment works, the owner or operator of such point source to pay the costs required under section 204 of this Act, and the publicly owned treatment works to accept the discharge from the point source; and (iii) the permit for such point source requires point source to meet all requirements under section 307 (a) and (b) during the period of such time modification.

(j) (1) Any application filed under this section for a modification of the provisions of—

(A) subsection (b) (1) (B) under subsection (h) of this section shall be filed not later than 270 days after the date of enactment of the Clean Water Act of 1977;

(B) subsection (b) (2) (A) as it applies to pollutants identified in subsection (b) (2) (F) shall be filed not later than 270 days after the date of promulgation of an applicable effluent guideline under section 304 or not later than 270 days after the date of enactment of the Clean Water Act of 1977, whichever is later.

(2) Any application for a modification filed under subsection (g) of this section shall not operate to stay any requirement under this Act, unless in the judgment of the Administrator such a stay or the modification sought will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the environment, acute toxicity, chronic toxicity (including carcinogenicity, mutagenicity or teratogenicity), or synergistic propensities, and that there is a substantial likelihood that the applicant will succeed on the merits of such application. In the case of an application filed under subsection (g) of this section, the Administrator may condition any stay granted under this paragraph on requiring the filing of a bond or other appropriate security to assure timely compliance with the requirements from which a modification is sought.

(k) In the case of any facility subject to a permit under section 402 which proposes to comply with the requirements of subsection (b) (2) (A) of this section by r placing existing production capacity with an innovativ production process which will result in an effluent reduction significantly greater than that required by the limitation otherwise applicable to such facility and moves toward the national goal of eliminating the discharge of all pollutants, or with the installation of an innovative control technique that has a substantial likelihood for enabling the facility to comply with the applicable effluent limitation by achieving a significantly greater effluent reduction than that required by the applicable effluent limitation and moves toward the national goal of eliminating the discharge of all pollutants, or by achieving the required reduction with an innovative system that has the potential for significantly lower costs than the system which have been determined by the Administrator to be economically achievable, the Administrator (or the State with an approved program under section 402, in consultation with the Administrator) may establish a date for compliance under subsection (b) (2) (A) of this section no later than July 1, 1987, if it is also determined that such innovative system has the potential for industrywide application.

(l) The Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 307(a) (1) of this Act.

WATER QUALITY RELATED EFFLUENT LIMITATIONS

Sec. 302. (a) Whenever, in the judgment of the Administrator discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 301(b) (2) of this Act, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

(b) (1) Prior to establishment of any effluent limitations pursuant to subsection (a) of this section, the Administrator shall issue notice of intent to establish such limitation and within ninety days of such notice hold a public hearing to determine the relationship of the economic and social costs of achieving any such limitation or limitations, including any economic or social dislocation in the affected community or communities, to the social and economic benefits to be obtained (including the attainment of the objective of this Act) and to determine whether or not such effluent limit tions can be implemented with available technology o other alternative control strategies.

title, including, but not limited to, projects eligible for reimbursement under section 206 of this title.

(b) No guarantee, or commitment to make a guarantee, may be made pursuant to this section—

(1) unless the Administrator certifies that the issuing body is unable to obtain on reasonable terms sufficient credit to finance its actual needs without such guarantee; and

(2) unless the Administrator determines that there is a reasonable assurance of repayment of the loan, obligation, or participation therein.

A determination of whether financing is available at reasonable rates shall be made by the Secretary of the Treasury with relationship to the current average yield on outstanding marketable obligations of municipalities of comparable maturity.

(c) The Administrator is authorized to charge reasonable fees for the investigation of an application for a guarantee and for the issuance of a commitment to make a guarantee.

(d) The Administrator, in determining whether there is a reasonable assurance of repayment, may require a commitment which would apply to such repayment. Such commitment may include, but not be limited to, (1) all or any portion of the funds retained by such grantee under section 204(b) (3) of this act, and (2) any funds received by such grantee from the amounts appropriated under section 206 of this act.

PUBLIC INFORMATION

Sec. 241. The Administrator shall develop and operate within one year of the date of enactment of this section, a continuing program of public information and education on recycling and reuse of wastewater (including sludge), the use of land treatment, and methods for the reduction of wastewater volume.

REQUIREMENTS FOR AMERICAN MATERIALS

Sec. 215. Notwithstanding any other provision of law, no grant for which application is made after February 1, 1978, shall be made under this title for any treatment works unless only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States, substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States will be used in such treatment works. This section shall not apply in any case where the Administrator determines, based upon those factor the Administrator deems relevant, including the available resources of the agency, it to be inconsistent with the public interest (including multilateral government procurement agreements) or the cost to be unreasonable, or if articles, materials, or supplies of the class or kind to be used or the articles, material, or supplies from which they are manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

DETERMINATION OF PRIORITY

Sec. 216. Notwithstanding any other provision of this Act, the determination of the priority to be given each category of projects for construction of publicly owned treatment works within each State shall be made solely by that State, except that if the Administrator, after a public hearing, determines that a specific project will not result in compliance with the enforceable requirements of this Act, such project shall be removed from the State's priority list and such State shall submit a revised priority list. These categories shall include, but not be limited to (A) secondary treatment, (B) more stringent treatment, (C) infiltration-in-flow correction, (D) major sewer system rehabilitation, (E) new collector sewers and appurtenances, (F) new interceptors and appurtenances, and (G) correction of combined sewer overflows. Not less than 25 per centum of funds allocated to a State in any fiscal year under this title for construction of publicly owned treatment works in such State shall be obligated for those types of projects referred to in clauses (D, (E), (F), and (G) of this section, if such projects are on such State's priority list for that year and are otherwise eligible for funding in that fiscal year.

COST-EFFECTIVENESS GUIDELINES

Sec. 217. Any guidelines for cost-effectiveness analysis published by the Administrator under this title shall provide for the identification and selection of cost effective alternatives to comply with the objective and goals of this Act and sections 201 (b), 201 (d), 201 (g) (2) (A), and 301 (b) (2) (B) of this Act.

TITLE III—STANDARDS AND ENFORCEMENT

EFFLUENT LIMITATIONS

Sec. 301. (a) Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

(b) In order to carry out the objective of this Act there shall be achieved—

(1) (A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304 (b) of this Act, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act; and

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(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 203 of this Act prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 304(d) (1) of this Act; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedule of compliance, established pursuant to any State law or regulations, (under authority preserved by section 510) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this Act.

(2) (A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b) (2) of this Act, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315), that such elimination is technologically and economically achievable for category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b) (2) of this Act or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (b) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 307 of this Act;

(B) not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in section 201(g) (2) (A) of this Act;

(C) not later than July 1, 1984, with respect to all toxic pollutants referred to in table 1 of Committee Print Number 95-30 of the Committee on Public Works and Transportation of the House of Representatives compliance with effluent limitations in accordance with subparagraph (A) of this paragraph;

(D) for all toxic pollutants listed under paragraph (1) of subsection (a) of section 307 of this Act which are not referred to in subparagraph (C) of this paragraph compliance with effluent limitation in accordance with subparagraph (A) of this paragraph not later than three years after the date such limitations are established;

(E) not later than July 1, 1984, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which in the case of pollutants identified pursuant to section 304(a) (4) of this Act shall require application of the best conventional pollutant control technology as determined in a cordance with regulations issued by the Administra pursuant to section 304(b) (4) of this Act; and

(F) for all pollutants (other than those subject to subparagraphs (C), (D), or (E) of this paragraph) compliance with effluent limitations in accordance with subparagraph (A) of this paragraph not later than 3 years after the date such limitations are established, or not later than July 1, 1984, whichever is later, but in no case later than July 1, 1987.

(c) The Administrator may modify the requirements of subsection (b) (2) (A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

(d) Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

(e) Effluent limitations established pursuant to this section or section 302 of this Act shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this Act.

(f) Notwithstanding any other provisions of this A it shall be unlawful to discharge any radiological, che ical, or biological warfare agent or high-level radioactive waste into the navigable waters.

(g) (1) The Administrator, with the concurrence of the State, shall modify the requirements of subsection (b) (2) (A) of this section with respect to the discharge of any pollutant (other than pollutants identified pursuant to section 304(a) (4) of this Act, toxic pollutants subject to section 307 (a) of this Act, and the thermal component of discharges from any point source upon a showing by the owner or operator of such point source satisfactory to the Administrator that—

(A) such modified requirements will result at a minimum in compliance with the requirements of subsection (b) (1) (A) or (C) of this section, whichever is applicable;

(B) such modified requirements will not result in any additional requirements on any other point or nonpoint source; and

(C) such modification will not interfere with the attainment of maintenance of that water quality which shall assure protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish, and wildlife, and allow recreational activities, in and on the water and such modification will not result in the discharge of pollutants in quantities which may reasonably be anticipated to pose an unacceptable risk to human health or the environment because of bioaccumulation, persistency in the envir ment, acute toxicity, chronic toxicity (including carci genicity, mutagenicity or teratogenicity), or synergistic propensities.

(2) If an owner or operator of a point source applies for a modification under this subsection with respect to the discharge of any pollutant, such owner or operator shall be eligible to apply for modification under subsection (c) of this section with respect to such pollutant only during the same time-period as he is eligible to apply for a modification under this subsection.

(h) The Administrator, with the consurrence of the State, may issue a permit under section 402 which modifies the requirements of subsection (b) (1) (B) of this section with respect to the discharge of any pollutant in an existing discharge from a publicly owned treatment works into marine waters, if the applicant demonstrates to the satisfaction of the Administrator that—

(1) there is an applicable water quality standard specific to the pollutant for which the modification is requested, which has been identified under section 304(a) (6) of this Act;

(2) such modified requirements will not interfere with the attainment or maintenance of that water quality which assures protection of public water supplies and protection and propagation of a balanced, indigenous population of shellfish, fish and wildlife, and allows recreational activities, in and on the water;

(3) the applicant has established a system for monitoring the impact of such discharge on a representative sample of aquatic biota, to the extent practicable;

(4) such modified requirements will not result in any additional requirements on any other point or nonpoint source;

(5) all applicable pretreatment requirements for sources introducing waste into such treatment works will be enforced;

(6) to the extent practicable, the applicant has established a schedule of activities designed to eliminate the entrance of toxic pollutants from nonindustrial sources into such treatment works;

(7) there will be no new or substantially increased discharges from the point source of the pollutant to which the modification applies above that volume of discharge specified in the permit;

(8) any funds available to the owner of such treatment works under title II of this Act will be used to achieve the degree of effluent reduction required by section 201 (b) and (g) (2) (A) or to carry out the requirements of this subsection.

For the purposes of this subsection the phrase "the discharge of any pollutant into marine waters" refers to a discharge into deep waters of the territorial sea or the waters of the contiguous zone, or into saline estuarine waters where there is strong tidal movement and other hydrological and geological characteristics which the Administrator determines necessary to allow compliance with paragraph (2) of this subsection, and section 101(a) (2) of this Act.

(i) (1) Where construction is required in order for a planned or existing publicly owned treatment works to achieve limitations under subsection (b) (1) (B) or (b) (1) (C) of this section, but (A) construction cannot be completed within the time required in such subsection, or (B) the United States has failed to make financial assistance under this Act available in time to achieve such limitations by the time specified in such subsection, the owner or operator of such treatment works may request the Administrator (or if appropriate the State) to issue a permit pursuant to section 402 of this Act or to modify a permit issued pursuant to that section to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after the date of enactment of this subsection. The Administrator (or if appropriate the State) may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the publicly owned treatment works based on the earliest date by which such financial assistance will be available from the United States and construction can be completed, but in no event later than July 1, 1983, and shall contain such other terms and conditions, including those necessary to carry out subsections (b) through (g) of section 201 of this Act, section 307 of this Act, and such interim effluent limitations applicable to that treatment works as the Administrator determines are necessary to carry out the provisions of this Act.

(2) (A) Where a point source (other than a publicly owned treatment works) will not achieve the requirements of subsections (b) (1) (A) and (b) (1) (C) of this section and—

(i) if a permit issued prior to July 1, 1977, to such point source is based upon a discharge into a publicly owned treatment works; or

(ii) if such point source (other than a publicly owned treatment works) had before July 1, 1977, a contract (enforceable against such point source) to discharge into a publicly owned treatment works; or

(iii) if either an application made before July 1, 1977, for a construction grant under this Act for a publicly owned treatment works, or engineering or architectural plans or working drawings made before July 1, 1977, for a publicly owned treatment works, show that such point source was to discharge into such publicly owned treatment works, and such publicly owned treatment works is presently unable to accept such discharge without construction, and in the case of a discharge to an existing publicly owned treatment works, such treatment works has an extension pursuant to paragraph (1) of this subsection, the owner or operator of such point source may request the Administrator (or if appropriate the State) to issue or modify such a permit pursuant to such section 402 to extend such time for compliance. Any such request shall be filed with the Administrator (or if appropriate the State) within 180 days after the date of enactment of this subsection or the filing of a request by the appropriate publicly owned treatment works under paragraph (1) of this subsection, whichever is later. If the Administrator (or if appropriate the State) finds that the owner or operator of such point source has acted in good faith, he may grant such request and issue or modify such a permit, which shall contain a schedule of compliance for the point source to achieve the require-

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such publicly owned treatment works may be revised by the owner or operator of such works to reflect the removal of such toxic pollutant by such works."

(2) The Administrator shall, from time to time, as control technology, processes, operating methods, or other alternative change, revise such standards following the procedure established by this subsection for promulgation of such standards.

(3) When proposing or promulgating any pretreatment standard under this section, the Administrator shall designate the category or categories of sources to which such standard shall apply.

(4) Nothing in this subsection shall affect any pretreatment requirement established by any State or local law not in conflict with any pretreatment standard established under this subsection.

(c) In order to insure that any source introducing pollutants into a publicly owned treatment works, which source would be a new source subject to section 306 if it were to discharge pollutants, will not cause a violation of the effluent limitations established for any such treatment works, the Administrator shall promulgate pretreatment standards for the category of such sources simultaneously with the promulgation of standards of performance under section 306 for the equivalent category of new sources. Such pretreatment standards shall prevent the discharge of any pollutant into such treatment works, which pollutant may interfere with, pass through, or otherwise be incompatible with such works.

(d) After the effective date of any effluent standard or prohibition or pretreatment standard promulgated under this section, it shall be unlawful for any owner or operator of any source to operate any source in violation of any such effluent standard or prohibition or pretreatment standard.

INSPECTIONS, MONITORING AND ENTRY

Sec. 308. (a) Whenever required to carry out the objective of this Act, including but not limited to (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this Act; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections 305, 311, 402, 404 (relating to State permit programs), and 504 of this Act—

(A) the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require; and

(B) the Administrator or his authorized represent tive, upon presentation of his credentials—

(i) shall have a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and

(ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under clause (A), and sample any effluents which the owner or operator of such source is required to sample under such clause.

(b) Any records, reports, or information obtained under this section (1) shall, in the case of effluent data, be related to any applicable effluent limitations, toxic, pretreatment, or new source performance standards, and (2) shall be available to the public, except that upon a showing satisfactory to the Administrator by any person that records, reports, or information, or particular part thereof (other than effluent data), to which the Administrator has access under this section, if made public would divulge methods or processes entitled to protection as trade secrets of such person, the Administrator shall consider such record, report, or information, or particular portion thereof confidential in accordance with the purposes of section 1905 of title 18 of the United States Code, except that such record, report, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this Act or when relevant any proceeding under this Act.

(c) Each State may develop and submit to the Administrator procedures under State law for inspection, monitoring, and entry with respect to point sources located in such State. If the Administrator finds that the procedures and the law of any State relating to inspection, monitoring, and entry are applicable to at least the same extent as those required by this section, such State is authorized to apply and enforce its procedures for inspection, monitoring, and entry with respect to point sources located in such State (except with respect to point sources owned or operated by the United States).

FEDERAL ENFORCEMENT

Sec. 309. (a) (1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which implements section 301, 302, 306, 307, 308, 318, or 405 of this Act in a permit issued by a State under an approved permit program under section 402 or 404 of this Act, he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply wi such condition or limitation or shall bring a civil acti in accordance with subsection (b) of this section.

(2) Whenever, on the the basis of information avail-

Senate shall be notified of the award by the Administrator and the awarding of such recognition shall be published in the Federal Register.

(f) Upon the request of a State water pollution control agency, personnel of the Environmental Protection Agency may be detailed to such agency for the purpose of carrying out the provisions of this Act.

GENERAL DEFINITIONS

Sec. 502. Except as otherwise specifically provided, when used in this Act:

(1) The term "State water pollution control agency" means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

(2) The term "interstate agency" means an agency of two or more States established by or pursuant to an agreement of compact approved by the Congress, or any other agency of two or more. States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

(3) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

(4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of this Act.

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 312 of this Act; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

(8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

(9) The term "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.

(10) The term "ocean" means any portion of the high seas beyond the contiguous zone.

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

(13) The term "toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.

(15) The term "biological monitoring" shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

(17) The term "schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

(18) The term "industrial user" means those industries identified in the Standard Industrial Classification

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prove each such submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) apply, and insure compliance with, any applicable requirements of sections 301, 302, 306, 307, and 403;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose fully all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2) (A) To issue permits which apply, and insure compliance with, all applicable requirements of section 308 of this Act, or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 308 of this Act;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement.

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require the identification in terms of character and volume of pollutants of any significant source introducing pollutants subject to pretreatment standards under section 307 (b) of this Act into such works and a program to assure compliance with such pretreatment standards by each such source, in addition to adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 306 if such source were discharging pollutants. (B) new introductions pollutants into such works from a source which wo be subject to section 301 if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 204 (b), 307, and 308.

(c) (1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304 (i) (2) of this Act. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and gui lines promulgated pursuant to section 304 (h) (2) of t Act.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of such program. The Administrator shall not withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(d) (1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b) (5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this Act. Whenever the Administr tor objects to the issuance of a permit under this pa graph such written objection shall contain a statement of the reasons for such objection and the effluent limita-

able to him, the Administrator finds that violations of permit conditions or limitations as set forth in paragraph (1) of this subsection are so widespread that such violations appear to result from a failure of the State to enforce such permit conditions or limitations effectively, he shall so notify the State. If the Administrator finds such failure extends beyond the thirtieth day after such notice, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Administrator that it will enforce such conditions and limitations (hereafter referred to in this section as the period of "federally assumed enforcement"), except where an extension has been granted under paragraph (5) (B) of this subsection, the Administrator shall enforce any permit condition or limitation with respect to any person—

(A) by issuing an order to comply with such condition or limitation, or

(B) by bringing a civil action under subsection (b) of this section.

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 301, 302, 306, 307, 308, 318, or 405 of this Act, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 402 of this Act by him or by a State or in a permit issued under section 404 of this Act by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

(4) A copy of any order issued under this subsection shall be sent immediately by the Administrator to the State in which the violation occurs and other affected States. In any case in which an order under this subsection (or notice to a violator under paragraph (1) of this subsection) is issued to a corporation, a copy of such order (or notice) shall be served on any appropriate corporate officers. An order issued under this subsection relating to a violation of section 308 of this Act shall not take effect until the person to whom it is issued has had an opportunity to confer with the Administrator concerning the alleged violation.

(5) (A) Any order issued under this subsection shall be by personal service, shall state with reasonable specificity the nature of the violation, and shall specify a time for compliance not to exceed thirty days in the case of a violation of an interim compliance schedule or operation and maintenance requirement and not to exceed a time the Administrator determines to be reasonable in the case of a violation of a final deadline, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(B) The Administrator may, if he determines (i) that any person who is a violator of, or any person who is otherwise not in compliance with, the time requirements under this Act or in any permit issued under this Act, has acted in good faith, and has made a commitment (in the form of contracts or other securities) of necessary resources to achieve compliance by the earliest possible date after July 1, 1977, but not later than April 1, 1979; (ii) that any extension under this provision will not result in the imposition of any additional controls on any other point or nonpoint source; (iii) that an application for a permit under section 402 of this Act was filed for such person prior to December 31, 1974; and (iv) that the facilities necessary for compliance with such requirements are under construction, grant an extension of the date referred to in section 301(b) (1) (A) to a date which will achieve compliance at the earliest time possible but not later than April 1, 1979.

(6) Whenever, on the basis of information available to him, the Administrator finds (A) that any person is in violation of section 301(b) (1) (A) or (C) of this Act, (B) that such person cannot meet the requirements for a time extension under section 301(i) (2) of this Act, and (C) that the most expeditious and appropriate means of compliance with this Act by such person is to discharge into a publicly owned treatment works, then, upon request of such person, the Administrator may issue an order requiring such person to comply with this Act at the earliest date practicable, but not later than July 1, 1983, by discharging into a publicly owned treatment works if such works concur with such order. Such order shall include a schedule of compliance.

(b) The Administrator is authorized to commence a civil action for appropriate relief, including a permanent or temporary injunction, for any violation for which he is authorized to issue a compliance order under subsection (a) of this section. Any action under this subsection may be brought in the district court of the United States for the district in which the defendant is located or resides or is doing business, and such court shall have jurisdiction to restrain such violation and to require compliance. Notice of the commencement of such action shall be given immediately to the appropriate State.

(c) (1) Any person who willfully or negligently violates section 301, 302, 306, 307, or 308 of this Act, or any permit condition or limitation implementing any of such actions in a permit issued under section 402 of this Act by the Administrator or by a State, or in a permit issued under section 404 of this Act by a State, shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. If the conviction is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment for not more than two years, or by both.

(2) Any person who knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained under this Act or who falsifies, tampers with, or knowingly renders inaccurate any

supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

COMPREHENSIVE PROGRAMS FOR WATER POLLUTION CONTROL

Sec. 102. (a) The Administrator shall, after careful investigation, and in cooperation with other Federal agencies, State water pollution control agencies, interstate agencies, and the municipalities and industries involved, prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of the navigable waters and ground waters and improving the sanitary condition of surface and underground waters. In the development of such comprehensive programs due regard shall be given to the improvements which are necessary to conserve such waters for the protection and propagation of fish and aquatic life and wildlife, recreational purposes, and the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes. For the purpose of this section, the Administrator is authorized to make joint investigations with any such agencies of the condition of any waters in any State or States, and of the discharges of any sewage, industrial wastes, or substance which may adversely affect such waters.

(b) (1) In the survey of planning of any reservoir by the Corps of Engineers, Bureau of Reclamation, or other Federal agency, consideration shall be given to inclusion of storage for regulation of streamflow, except that any such storage and water releases shall not be provided as a substitute for adequate treatment or other methods of controlling waste at the source.

(2) The need for and the value of storage or regulation of streamflow (other than for water quality) including but not limited to navigation, salt water intrusion, recreation, esthetics, and fish and wildlife, shall be determined by the Corps of Engineers, Bureau of Reclamation, or other Federal agencies.

(3) The need for, the value of, and the impact of, storage for water quality control shall be determined by the Administrator, and his views on these matters shall be set forth in any report or presentation to Congress proposing authorization or construction of any reservoir including such storage.

(4) The value of such storage shall be taken into account in determining the economic value of the entire project of which it is a part, and costs shall be allocated to the purpose of regulation of streamflow in a manner which will insure that all project purposes, share equitably in the benefits of multiple-purpose construction.

(5) Costs of regulation of streamflow features incorporated in any Federal reservoir or other impoundment under the provisions of this Act shall be determined and the beneficiaries identified and if the benefits are widespread or national in scope, the costs of su features shall be nonreimbursable.

(6) No license granted by the Federal Power Commission for a hydroelectric power project shall include storage for regulation of streamflow for the purpose of water quality control unless the Administrator shall recommend its inclusion and such reservoir storage capacity shall not exceed such proportion of the total storage required for the water quality control plan as the drainage area of such reservoir bears to the drainage area of the river basin or basins involved in such water quality control plan.

(c) (1) The Administrator shall, at the request of the Governor of a State, or a majority of the Governors when more than one State is involved, make a grant to pay not to exceed 50 per centum of the administrative expenses of a planning agency for a period not to exceed three years, which period shall begin after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972, if such agency provides for adequate representation of appropriate State, interstate, local, or (when appropriate) international interests in the basin or portion thereof involved and is capable of developing an effective, comprehensive water quality control plan for a basin or portion thereof.

(2) Each planning agency receiving a grant under this subsection shall develop a comprehensive pollution control plan for the basin or portion thereof which—

(A) is consistent with any applicable water qual standards, effluent and other limitations, and thermal discharge regulations established pursuant to current law within the basin;

(B) recommends such treatment works as will provide the most effective and economical means of collection, storage, treatment, and elimination of pollutants and recommends means to encourage both municipal and industrial use of such works;

(C) recommends maintenance and improvement of water quality within the basin or portion thereof and recommends methods of adequately financing those facilities as may be necessary to implement the plan; and

(D) as appropriate, is developed in cooperation with, and is consistent with any comprehensive plan prepared by the Water Resources Council, any areawide waste management plans developed pursuant to section 208 of this Act, and any State plan developed pursuant to section 303(e) of this Act.

(3) For the purposes of this subsection the term "basin" includes, but is not limited to, rivers and their tributaries, streams, coastal waters, sounds, estuaries, bays, lakes, and portions thereof, as well as the lands drained thereby.

(d) The Administrator, after consultation with the States, and River Basin Commissions established under the Water Resources Planning Act, shall submit a report to Congress on or before July 1, 1978, which analy the relationship between programs under this Act, a the programs by which State and Federal agencies allocate quantities of water. Such report shall include rec-

APPENDIX C - NEUTRAL INSPECTION PLAN

CRITERIA FOR NEUTRAL SELECTION OF NPDES COMPLIANCE INSPECTION CANDIDATES

A. BACKGROUND

In response to the recent Supreme Court decision in Marshall v. Barlow's Inc., 436 U.S. 307 (1978), the Agency is developing neutral inspection criteria to be used when targeting compliance inspections. The purpose of using the neutral inspection plan is to eliminate any bias in choosing candidates for compliance inspections.

Under the National Pollutant Discharge Elimination System (NPDES) authorized by Section 402(a)(1) of the Clean Water Act, over 50,000 permits have been issued for the discharge of pollutants. Of these issued permits, about 8,000 have been classified by EPA or states with NPDES authority as major permittees. The designation of a permittee as "major" is based on quantity and potential environmental impact of the wastewater source.

EPA's program to monitor compliance with the terms and conditions of issued NPDES permits is primarily designed to ensure the compliance of the major permittees. EPA has not been provided with sufficient resources to routinely monitor the compliance of the remaining minor permittees.

Compliance inspections performed under the NPDES program can be divided into two general categories: 1) those inspections based on administrative factors; and 2) those inspections based on specific evidence of an existing violation, e.g. civil probable cause.

Inspections based on the second category are not neutral since they are based on prior knowledge of apparent or probable permit violations. Factors which constitute specific evidence include: 1) violations reported on recent DMRs; 2) citizen complaints; 3) response to emergency situations, such as threats to public health or safety; 4) follow-up to previous inspections which indicated violations; and 5) specific enforcement case support.

For targeting inspections which rely strictly on administrative factors, the Agency has developed the following neutral inspection plan.

B. UNIVERSE OF NPDES INSPECTION CANDIDATES

The EPA, upon the presentation of credentials, has the authority to enter and inspect all NPDES permitted facilities at any time regardless of other factors such as "major" or "minor" designations. Because of limited resources, not all facilities are targeted for inspections each year. The frequency with which compliance inspections are performed is based on the discharger's environmental significance, available resources, the types and mix of inspections being employed, climatic and geographical influences on inspection logistics, and other factors influencing compliance monitoring such as the ability to follow up on inspection findings.

C. BASIC SELECTION CRITERIA

When targeting permittees of neutral compliance inspections, the time that has passed since the last inspection and the geographical grouping of the permittees are the only factors which may be considered. Other information, such as data from DMRs which indicated apparent violations, would not be used since this would constitute probable cause under the civil standard. However, the existence of such data would not preclude the facility from being considered for a neutral inspection if this neutral plan is followed during the selection process.

The only permittees who would not be considered when targeting neutral compliance inspections are permittees who are in current litigation with EPA. This does not apply to state litigation.

D. NEUTRAL COMPLIANCE INSPECTIONS

To target inspections based on a neutral inspection plan, Regions will first determine the length of time that has passed since the last EPA or state inspection for all major permittees. This can be done easily using the capabilities of the Permit Compliance System (PCS) available in each EPA Regional Office. A PCS report can be generated which will print out each major permittee in order by the date of the last inspection. Appendix A contains a sample list which the PCS System can generate. A separate report should be generated for each state in the Region. In some cases, it may be appropriate to use subdistricts (by county) of a state depending on the organizational structure in a specific state or Region. The permittees which are highest on the list (greatest time since last inspection) will have the highest priority for neutral inspections.

In order to minimize use of Agency resources, inspection targeting should be based on both the priority list and geographical grouping. For example, any permittee on the list may be targeted for an inspection if it is in close physical proximity to a facility which is very high on the list. This is extremely important as it allows the most efficient use of the limited inspection resources. The PCS System can give the names and most recent inspection dates for all permittees which are in the same county as a permittee which is selected for an inspection.

The priority list will identify only those facilities which are possible targets for compliance inspections during the current fiscal year. The exact timing of these inspections during the fiscal year will be at the discretion of the Regional Office, based on logistics and specific Regional needs.

The list of permittees targeted for inspections may be amended at any time during the fiscal year. Similarly, before the start of a new fiscal year, Regional Offices should reassess all permittees regardless of whether all previously targeted inspections have been completed for the current fiscal year.

E. INSTRUCTIONS FOR TARGETING INSPECTIONS BASED ON THE POINT ASSESSMENT SYSTEM

To use the neutral inspection plan, Regional Offices will first determine the percentage of inspection resources that will be devoted to neutral administrative inspections. This will depend, to a large extent, on the ongoing enforcement case load and the percentage of major permittees which have probable violations of effluent limitations and compliance schedules. For example, a Region may allocate the following resources for neutral inspection activities:

a) 10% of the Compliance Sampling Inspection resources;
b) 25% of the Performance Audit Inspection resources; and
c) 50% of the Compliance Evaluation Inspection resources.

The remaining Regional inspection resources would be reserved for inspections based on probable cause and specific enforcement case support.

The Region should next determine the approximate number of neutral inspections that can be completed using the resources allocated for each inspection type (CSI, CEI, PAI). This number will be flexible depending on the type and/or the number of outfalls and size of the permitted facility.

For each state, starting with the permittees highest on the list, proceed down the priority list until about one third of the neutral inspection resources for that state have been allocated. For example, if the allocated inspection resources for neutral inspections in a particular state are enough for 30 inspections, approximately the first 10 permittees on the priority list would be targeted. The Region should then use the remaining 20 inspections for permittees which are grouped with the already targeted candidates based on common geographical and/or special technical considerations. For example, a Region may target a sampling inspection at a facility with a high point rating, and then target several more sampling inspections, CEIs or PAIs in the same geographic area. This would allow all these inspections to be done on one inspection trip.

Regions may target inspections to single facilites at times, such as when the facility is in close proximity to Regional Offices or Field Offices.

A specific percentage of inspection resources are set aside each fiscal year for enforcement case support activities and emergency response. By the last quarter of the fiscal year, Regions should know to what extent these set-aside resources will be available for routine inspections. To the extent that these resources become available, they should be utilized to inspect the remaining permittees on the priority list.

Appendix A

The following two pages are sample printouts from the Permit Compliance System (PCS) for the State of New Jersey. Printout 1 gives a partial listing of major NPDES facilities in order by the date of the last inspection. Permittees with no date listed for inspections have not had an inspection which was noted in PCS. These permittees will have the highest priority for neutral inspections.

Printout 2 is a list of permittees and inspection dates by county (for New Jersey). This Printout is used to identify permittees which may be in close physical proximity to facilities which were chosen for inspections from Printout 1.

Printout 1

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                    THE PERMIT COMPLIANCE SYSTEM                    9125 MONDAY, JUNE 16, 1980   1

          ALL MAJOR FACILITIES AND THEIR LATEST INSPECTION

--------------------------------------- REGION=02   STATE=NJ ------------------------------------------

NAME                              IDATE    ITYPE   INSP    NPDES       CITY                     CNTY

PSE&G CO HARRISON GAS PLANT                                NJ0000566   HARRISON                 HUDSON
PUBLIC SERVICE ELEC & GAS                                  NJ0000582   EDISON /TWP/             MIDDLESEX
PUBLIC SERVICE ELEC & GAS                                  NJ0000639   NEWARK                   ESSEX
PUBLIC SERVICE ELEC & GAS                                  NJ0000671   JERSEY CITY /C/          HUDSON
NL INDUSTRIES                                              NJ0000931   SAYREVILLE               MIDDLESEX
WHIPPANY PAPERBOARD CO,                                    NJ0001457   CLIFTON                  PASSAIC
SCHERING CORP,                                             NJ0002305   KENILWORTH               UNION
E.I. DU PONT DE NEMOUR CORP,                               NJ0002640   LINDEN                   UNION
SCIENTIFIC CHEMICAL PROCESSING                             NJ0003212   CARLSTADT BORO           BERGEN
PFIZER INC,                                                NJ0003450   PARSIPPANY               MORRIS
PORT AUTHORITY OF N Y AND N J                              NJ0003924   NEWARK                   ESSEX
BORDEN INC-SNOW FOOD PROD,                                 NJ0004961   CAPE MAY                 CAPE MAY
P,S,E,& G MERCER GENER STA                                 NJ0004995   HAMILTON /TWP/           MERCER
ATLANTIC CITY ELEC,                                        NJ0005363   PENNS GROVE              SALEM
JERSEY CENTRAL POWER & LIGHT                               NJ0005517   MILFORD                  HUNTERDON
JERSEY CENTRAL POWER & LIGHT                               NJ0005550   LACEY TWP                OCEAN
P,S,E, & G,                                                NJ0005622   HANCOCKS BRIDGE          SALEM
CITY OF ELIZABETH                                          NJ0020648   ELIZABETH /C/            UNION
PASSAIC VALLEY SEWERAGE COMM                               NJ0021016   NEWARK                   ESSEX
MOBIL CHEMICAL DIST, SER,                                  NJ0024392   CARTERET                 MIDDLESEX
ATLANTIC COUNTY S.A.                                       NJ0024473   ATLANTIC CITY            ATLANTIC
CUMBERLAND COUNTY UTILITIES AU                             NJ0024651   BRIDGETON /C/            CUMBERLAND
MONMOUTH CO, BAYSHORE OUTFALL                              NJ0024694   MIDDLETOWN               MONMOUTH
CITY OF NEWARK DPW                                         NJ0024724   NEWARK                   ESSEX
P,S,E,& G HOPE CREEK                                       NJ0025411   LOWER ALLOWAYS CREEK     SALEM
CITY OF ORANGE DPW                                         NJ0025925   ORANGE /C/               ESSEX
PEQUANNOCK LIN,PK,& FAIRFILD S                             NJ0029386   LINCOLN PARK             MORRIS
OCEAN COUNTY SEWERAGE AUTH,                                NJ0029408   BERKELEY TWP             OCEAN
CITY OF BORDENTOWN DPW            741211     C       R     NJ0024678   BORDENTOWN /C/           BURLINGTON
OLIN CORPORATION                  750305     S       R     NJ0005088   PAULSBORO                GLOUCESTER
FOSTER GLASS WORKS                750904     S       R     NJ0004715   SALEM                    SALEM
JOINT MTG RUTH-E,RUTH-CARL,       751125     C       R     NJ0022756   RUTHERFORD               BERGEN
PUBLIC SERVICE ELECTRIC & GAS     760305     C       S     NJ0000663   LINDEN                   UNION
PUBLIC SERVICE ELEC & GAS         760326     C       S     NJ0000680   WOODBRIDGE               MIDDLESEX
PICATINNY ARSENAL                 761109     C       R     NJ0002500   DOVER                    MORRIS
CAMDEN COUNTY MUA                 761110     C       S     NJ0026182   CAMDEN                   CAMDEN
BEVERLY SEWERAGE AUTHORITY        770203     C       S     NJ0027481   BEVERLY /CITY/           BURLINGTON
STEPAN CHEM CO IND CHEM DIV       770210     C       R     NJ0005410   FIELDSBORO               BURLINGTON
DIAMOND SHAMROCK CORP             770328     C       R     NJ0002798   CARLSTADT BORO           BERGEN
CHEVRON OIL CO                    770627     C       R     NJ0000264   ELIZABETH /C/            UNION
CHEMICAL CONTROL CORPORATION      770805     C       R     NJ0024201   ELIZABETH /C/            UNION
WARNER-CHILCOTT LABORATORIES      770811     C       S     NJ0002542   MORRIS PLAINS            MORRIS
HEINZ USA SALEM                   770831     C       R     NJ0004693   SALEM                    SALEM
FLORHAM PARK SEW, AUTH,           770907     S       R     NJ0025518   FLORHAM PARK             MORRIS
TOWN OF WEST NEW YORK             771130     C       R     NJ0025321   WEST NEW YORK            HUDSON
MOORESTOWN TWP STP                771205     C       R     NJ0024995   MOORESTOWN TWP           BURLINGTON
WILLINGBORO MUA STP               771206     C       R     NJ0023361   WILLINGBORO TWP          BURLINGTON
BURLINGTON TWP MAIN STP           771212     C       R     NJ0021709   BURLINGTON /TWP/         BURLINGTON
CITY OF [illegible]RLINGTON             771212     C       R     NJ0024660   BURLINGTON /C/           BURLINGTON
HAMILT[illegible]WP MUA                 780215     C       R     NJ0[illegible]393   MAYS LANDING             ATLANTIC
CHERRY HILL TOWNSHIP              780223     C       S     NJ0[illegible]01    CHERRY HILL /TWP/        CAMDEN
[illegible]                       780228     C       R     NJ00[illegible]953  LINDEN                   UNION
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Printout 2

APPENDIX C
(Page 9 of 9)

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                                     THE PERMIT COMPLIANCE SYSTEM                          9:25 MONDAY, JUNE 16, 1980   21

                              ALL MAJOR FACILITIES AND THEIR LATEST INSPECTION

------------------------------------------------------ REGION=02   STATE=NJ ---------------------------------------------------

     NAME                              IDATE    ITYPE    INSP     NPDES       CITY                   CNTY

     ATLANTIC COUNTY S.A.                                         NJ0024473   ATLANTIC CITY          ATLANTIC
     HAMILTON TWP MUA                  780215     C        R      NJ0021393   MAYS LANDING           ATLANTIC
     CITY OF EGG HARBOR                790215     C        S      NJ0024589   EGG HARBOR CITY /C/    ATLANTIC
     TOWN OF HAMMONTON                 790611     C        S      NJ0025160   HAMMONTON              ATLANTIC
     BUENA BOROUGH MUA                 791003     C        S      NJ0021717   BUENA BORO             ATLANTIC
     SCIENTIFIC CHEMICAL PROCESSING                               NJ0003212   CARLSTADT BORO         BERGEN
     JOINT MTG RUTH-E,RUTH-CARL,       751125     C        R      NJ0022756   RUTHERFORD             BERGEN
     DIAMOND SHAMROCK CORP             770328     C        R      NJ0002798   CARLSTADT BORO         BERGEN
     TECHNICAL OIL PRODUCTS INC        780626     C        R      NJ0005754   CARLSTADT BORO         BERGEN
     MATHESON GAS PROD. CO.            780629     C        R      NJ0002721   EAST RUTHERFORD        BERGEN
     ROYCE CHEMICAL CO                 780911     C        R      NJ0002682   EAST RUTHERFORD        BERGEN
     MARCAL PAPER MILLS INC            780914     C        R      NJ0002674   EAST PATERSON          BERGEN
     BENDIX CORP.                      781025     S        R      NJ0002097   TETERBORO              BERGEN
     ABEX CORPORATION.                 790301     C        S      NJ0000108   MAHWAH TWP             BERGEN
     INTERMEDIATES DIV-TENN. CHEM.     790328     C        R      NJ0000124   GARFIELD               BERGEN
     HACKENSACK WATER COMPANY          790329     C        R      NJ0003310   ORADELL                BERGEN
     BOROUGH OF EDGEWATER              790329     C        S      NJ0020591   EDGEWATER BORO         BERGEN
     FORD MOTOR CO MAHWAH              790419     C        S      NJ0002704   MAHWAH TWP             BERGEN
     LEVER BROTHERS CO.                790516     C        S      NJ0002143   EDGEWATER BORO         BERGEN
     TRANSCONTINENTAL GAS PIPE LINE    790606     C        S      NJ0002101   CARLSTADT BORO         BERGEN
     BERGEN COUNTY UTILITIES AUTH.     790620     C        R      NJ0020028   LITTLE FERRY /BORO/    BERGEN
     UNIVERISAL OIL PROD.              790702     C        S      NJ0001252   EAST RUTHERFORD        BERGEN
     NORTHWEST BERGEN COUNTY S.A.      790802     C        S      NJ0024813   WALDWICK               BERGEN
     HAWARD CORPORATION                790912     C        S      NJ0023868   NORTH ARLINGTON        BERGEN
     NO.ARLINGTON LYNDHURST JNT MTG    791019     C        R      NJ0025291   NORTH ARLINGTON        BERGEN
     PUBLIC SERVICE ELEC & GAS         791128     C        S      NJ0000621   RIDGEFIELD BORO        BERGEN
     BOROUGH OF FAIR LAWN NJ           800108     C        S      NJ0023671   FAIRLAWN               BERGEN
     VILLAGE OF RIDGEWOOD              800305     C        S      NJ0024791   RIDGEWOOD /V/          BERGEN
     CITY OF BORDENTOWN DPW            741211     C        R      NJ0024678   BORDENTOWN /C/         BURLINGTON
     BEVERLY SEWERAGE AUTHORITY        770203     C        S      NJ0027481   BEVERLY /CITY/         BURLINGTON
     STEPAN CHEM CO IND CHEM DIV       770210     C        R      NJ0005410   FIELDSBORO             BURLINGTON
     MOORESTOWN TWP STP                771205     C        R      NJ0024996   MOORESTOWN TWP         BURLINGTON
     WILLINGBORO MUA STP               771206     C        R      NJ0023361   WILLINGBORO TWP        BURLINGTON
     BURLINGTON TWP MAIN STP           771212     C        R      NJ0021709   BURLINGTON /TWP/       BURLINGTON
     CITY OF BURLINGTON                771212     C        R      NJ0024660   BURLINGTON /C/         BURLINGTON
     IONAC CHEM CO DIV OF SYBRON       780830     C        R      NJ0005509   BIRMINGHAM             BURLINGTON
     TENNECO CHEMICALS INC             781004     S        R      NJ0004391   BURLINGTON /TWP/       BURLINGTON
     GRIFFIN PIPE PRODUCTS             781212     S        R      NJ0005096   FLORENCE TWP           BURLINGTON
     MOUNT LAUREL MUA                  790103     S        R      NJ0025178   MOUNT LAUREL TWP       BURLINGTON
     EVESHAM MUA                       790215     C        S      NJ0024040   EVESHAM TWP            BURLINGTON
     MEDFORD TOWNSHIP                  790215     C        S      NJ0026832   MEDFORD                BURLINGTON
     BURLINGTON TWP LA GORCE SQUARE    790307     C        S      NJ0021695   BURLINGTON /TWP/       BURLINGTON
     DELRAN SEWERAGE AUTHORITY         790314     C        S      NJ0023507   DELRAN TWP             BURLINGTON
     MOUNT HOLLY SEWERAGE AUTHORITY    790314     C        S      NJ0024015   MOUNT HOLLY            BURLINGTON
     MOUNT LAUREL MUA                  790417     C        S      NJ0023981   MOUNT LAUREL TWP       BURLINGTON
     MAC-MCGUIRE AFB                   790425     C        S      NJ0022578   BURLINGTON /C/         BURLINGTON
     HOOKER CHEMICAL CORP              790427     C        R      NJ0004235   BURLINGTON /TWP/       BURLINGTON
     HERCULES INC                      790502     C        S      NJ0005142   BURLINGTON /TWP/       BURLINGTON
     FORT DIX                          790517     C        S      NJ0004855   FORT DIX               BURLINGTON
     ARMAK COMPANY                     790530     C        S      NJ0004568   MAPLE SHADE            BURLINGTON
     P.S.G.&E.                         790619     C        S      NJ0005002   BURLINGTON /C/         BURLINGTON
     P.S.E. & G.                       790619     C        S      NJ0005690   BURLINGTON COUNTY B    BURLINGTON
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APPENDIX D - SAMPLE 308 LETTER

Date

Dear Mr. ______________:

Pursuant to the authority contained in Section 308 of the Federal Water Pollution Control Act (33 U.S.C. 1318) representatives of the Environmental Protection Agency, specifically, the NEIC office in Denver, Colorado and/or Region ___ will conduct an inspection of your Company's manufacturing operations together with associated waste treatment and discharge facilities. The inspection is planned for the week of ________________ and is intended to determine degree of compliance with the requirements of the National Pollutant Discharge Elimination System issued to your Company.

Our representatives will observe your process operations, inspect and evaluate your monitoring/field/laboratory equipment and methods; examine appropriate records; and will be concerned with related matters.

The EPA visit will focus on procedures, and accordingly, it is requested that Company monitoring under conditions of the NPDES permit be scheduled to precisely correspond with this inspection. We ask only that the Company conduct its monitoring (for all parameters, if at all possible) under normal procedures and practices. On-the-spot observation shall be made of sample collection, any field preservation of samples, handling and transport of samples, field and analytical equipment in operation, and the actual conduct of analytical/laboratory procedures. If analyses are conducted by an ouside contractor, please notify your agent that EPA personnel will evaluate analytical tests and methods as they are being performed. Please inform us if these tests are conducted elsewhere than at your main manufacturing location.

Please provide the name of any "new" individual whom we may not have had contact with in the past (if such is necessary) to enable our access to the plant. We would appreciate a list of safety equipment if required by our people. Any reports or information that may be considered confidential by you will be treated in accordance with Section 308(b) of the Act, but should be properly identified as such to the EPA, and necessary reasons for confidential claims may need to be made available to the EPA. However, "effluent data" is always considered accessible to the public.

If you have any questions concerning this inspection, please telephone __________________________, NEIC, Denver at ____________________.

Sincerely yours,

Date

ABC Company

Pursuant to the authority contained in Section 308 of the Federal Water Pollution Control Act (33 U.S.C. 1318) representatives of the Environmental Protection Agency (EPA), specifically of the National Enforcement Investigations Center, or Region V, may conduct an inspection of your Company's manufacturing operations, together with associated waste treatment and discharge facilities, within the next six months. The inspection is designed to carry out EPA's responsibilities under Section 308. The persons who will be conducting the inspections will be authorized representatives of the Environmental Protection Administration as referred to in Section 308 and will present appropriate credentials. They will observe your process operations; inspect and evaluate your monitoring/field/laboratory equipment and methods; examine monitoring and calibration records and other appropriate records; and will be concerned with related matters.

The EPA visit will focus on procedures and, accordingly, it is requested that Company monitoring be conducted under usual practices and procedures. On-the-spot observations shall be made of sample collecting, field preservation of samples, handling and transport of samples, and field and analytical equipment used in the actual conduct of analytical/laboratory procedures. If analyses are conducted by an outside contractor, EPA personnel will also evaluate analytical tests and methods as they are being performed. Please inform the inspectors if any tests are conducted other than at your main manufacturing location.

It is requested that plant process flow diagrams, waste treatment plant flow diagrams, and treatment plant design data be made available to the inspectors during the first day of their inspection.

The EPA inspectors will also provide verification samples for analytical evalution by the Company for certain pollutant parameters. The results of these tests, as well as the results of the compliance monitoring sampling taken during the inspection, should be transmitted to the EPA's National Enforcement Investigations Center, Denver Federal Center, P.O. Box 25227, Denver, Colorado 80225, within two weeks after the EPA inspection.

Please inform the appropriate plant personnel to expect such an inspection to ensure a rapid plant entry and to ensure that these surveys are conducted without unnecessary delay.

We will appreciate your full cooperation in this matter.

Sincerely yours,

APPENDIX E - CREDENTIALS

COMPLIANCE AUDITOR

Credentials and Designation

Under authority delegated to me by the Administrator of the
U.S. Environmental Protection Agency

____
Contractor's Representative

whose signature appears below, is designated as an authorized representative of the Administrator. This authorization is for the purpose of performing duties listed in section 308(a), clause (B) of the Clean Water Act. These duties are to be performed in accordance with a contract between EPA and the representative's employer.

Issued

U.S. EPA Contract No.

Expires

Document Control No.

____
(Signature)
Authorized Representative

____
(Signature)
U.S. EPA Project Officer
Phone

APPENDIX F - SAMPLE WARRANT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

IN THE MATTER OF:)
)
GENERAL MOTORS CORPORATION)
GENERAL MOTORS ASSEMBLY DIVISION)
WILLOW RUN AIRPORT) APPLICATION FOR
YPSILANTI, MICHIGAN 48197) ADMINISTRATIVE WARRANTS
AND)
VEHICLE EMISSION LABORATORY)
GENERAL MOTORS PROVING GROUND)
MILFORD, MICHIGAN 48042)

NOW COMES the Administrator for the Environmental Protection Agency (EPA), by and through the United States Attorney, and applies for administrative warrants to enter, to observe a Selective Enforcement Audit (SEA) test on a configuration of motor vehicles manufactured by the General Motors Corporation (GM) as specified in a SEA test order issued on July 28, 1978, by the Assistant Administrator for Enforcement of EPA, and to inspect GM's records, files, papers, processes, controls, and facilities which are involved in and associated with the manufacture and testing of said configuration pursuant to said test order at the premises of the GM Willow Run vehicle assembly plant, Ypsilanti, Michigan, and the GM vehicle emission laboratory at Milford, Michigan, in accordance with Sections 206(b) and (c), 208(a) and 301(a) of the Clean Air Act, 42 U.S.C. §7525(b) and (c), 7542(a) and 7601(a), and regulations promulgated thereunder. In support of this application, the Administrator respectfully submits an affidavit and proposed warrants.

James K. Robinson
United States Attorney

By:______________________
Assistant United States Attorney

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF EAST BATON ROUGE

I, Edward McHam, being duly sworn, hereby depose and say:

1. I am a duly authorized employee of the United States Environmental Protection Agency, and my title is Chemical Engineer, Surveillance and Analysis Division, Region VI, which includes the State of Louisiana. In my capacity, I am responsible for inspecting facilities subject to various federal environmental statutes as directed by my supervisors.

2. On Tuesday, August 1, 1978 from about 7:45 p.m. to 8:45 p.m., I made a preliminary inspection of the CLAW facility and took two samples at the open pits. On Wednesday, August 2, 1978 I took a few photographs of the facilities from around 3:30 p.m. until 5:30 p.m. On Thursday, August 3, 1978 accompanied by another EPA employee, I visited the facility and area from about 11:30 a.m. to 2:00 p.m. and also took a few additional photographs. These brief visits to the site have only involved facility employees a few minutes each time in order to obtain passes from the field office and to open gates at various guard houses.

3. On Friday, August 4, 1978, a local deputy sheriff, state and local officials and I were refused admittance to the CLAW facility. Also, CLAW officials were no longer at the field house or available elsewhere to issue passes to enter. My previous sampling and inspection was not sufficient for laboratory purposes and needs to be resumed.

4. Information I have gathered in the local community, in newspapers, on television, from laboratory

tests of the samples, from the Iberville Sheriff's Office, and at the CLAW facility strongly suggest and support the need to enter and inspect the facilities for possible Section 301, 311 and other violations of the Federal Water Pollution Control Act. Further, it is possible that there are hazardous wastes and conditions on the premises as defined in Section 1004(5) of the Resource Conservation and Recovery Act of 1976, (42 USC 6903)(5) which constitute an imminent hazard under section 7003 of the Resource Conservation and Recovery Act of 1976 (42 USC 6973). These observations are:

a. Obvious spillage of waste material on the grounds of the CLAW facility subject to entering waterways.

b. Contaminated landfills with obviously exposed and damaged barrels with their contents emptied or nearly empty.

c. Drainage from landfills into a "fishing" lake and other adjacent areas leading to various waterways.

d. Open pits containing oil wastes and hazardous, toxic chemical wastes with the appearance of overflow wastes on the adjacent grounds as well as high water marks on trees next to the open pits equal to or higher than the pits.

e. The lack of levees between the facility grounds and drainage areas to the Grand River, "fishing lake", bayous and barrow ditches.

f. Copies of a few facility log records and other documents which were previously copied by the local Sheriff's office. These records indicate the receipt and content of oil and hazardous chemical wastes accepted at the facility.

g. Poor maintenance and sloppy "housekeeping" practices at the facility which leads a reasonable person to recognize the likelihood of these prohibited pollutants entering into nearby waterways including waters of the United States and its tributaries, as well as posing a threat to the environment and the public health and welfare of the United States.

h. The reported death of a 19 year old truck driver at the CLAW (EPA, Inc.) open pits on July 25, 1978 while he was discharging waste into an open pit at the facility. The death was possibly caused by his inhalation of toxic fumes caused by a reaction of mixing incompatible toxic wastes in the open pit. Two eye witnesses to the death of the driver reported the presence of choking fumes in the area when they opened the doors to their truck to assist the driver who died. They also reported that his truck was parked at the edge of the open pit with the doors open at the time of death. Subsequent laboratory tests of waste taken from the pits have shown waste materials were present in the pit, which, when mixed with the spent caustic being discharged from the driver's truck could have caused the death. Final autopsy reports are still pending. It is allegedly reported that CLAW facility officials directed the driver to take and discharge his wastes to the truck ramp on the edge of an open pit. Discharging toxic waste into an open pit at the edge of a pit is not a safe, desirable, or acceptable practice since toxic chemical reactions are very probable and can result in the death of anyone nearby.

5. Section 308 of the Federal Water Pollution Control Act, 33 USC 1318, and section 3007 of the Resource Conservation and Recovery Act of 1976, (42 USC 6927), providing for entry, inspection, record inspection and copying and sampling are reasonable, in the public interest and necessary in order to carry out the provisions of these Acts, which Acts are designed to protect the environment, as

well as the public health and welfare. In the instant matter it is reasonable to assume the need for inspection based on the information and observations set out in paragraph 4 above and in the public interest.

Edward C. McHam
EDWARD C. MC HAM
CHEMICAL ENGINEER
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY

Subscribed and sworn to before me
at Baton Rouge, State of Louisiana,
this 10 of August, 1978.

U.S. Magistrate

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

IN THE MATTER OF
CLEAN LAND AIR AND WATER,
CORPORATION, d/b/a CLAW;
ETC., ET AL.

NO. 78-13M

WARRANT OF ENTRY, INSPECTION
AND MONITORING PURSUANT TO
33 U.S.C.§1318 and 42 U.S.C.§6927

TO: THE UNITED STATES OF AMERICA, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, THROUGH ITS DULY DESIGNATED REPRESENTATIVE OR REPRESENTATIVES, THE UNITED STATES MARSHAL OR ANY OTHER FEDERAL OFFICER

An application having been made by the United States of America, United States Environmental Protection Agency, for a warrant of entry, inspection and monitoring pursuant to 33 U.S.C.§1318 and 42 U.S.C.§6927, as part of an inspection program designed to assure compliance with the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act), 33 U.S.C.§1251, et seq., and the Resource and Recovery Act of 1976 (42 U.S.C.§6901, et seq.), and an affidavit having been made before me by Edward McHam, a duly authorized employee of the United States Environmental Protection Agency, that he has reason to believe that on the premises hereinafter described there exist a danger to the public's health, welfare and safety and to the property, rivers and environment of the United States, and that in order to determine whether the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act), 33 U.S.C.§1251, et seq., and the Resource and Recovery Act of 1976 (42 U.S.C.§6901, et seq.), and the rules, regulations and orders issued pursuant to the Acts have been or are being violated, an entry on, and inspection and monitoring of the said described property is required and necessary;

And, the Court being satisfied that there has been a sufficient showing that reasonable legislative or administrative standards for conducting an inspection and investigation have been satisfied with respect to the said described property and that probable cause exist to issue a warrant for the entry, inspection, investigation and monitoring of the said described premises:

IT IS HEREBY ORDERED AND COMMANDED that the United States of America, United States Environmental Protection Agency, through its duly designated representative or representatives, the United States Marshal, or any other federal officer are hereby entitled to and shall be authorized and permitted to have entry upon the following described property which is located in the Middle District of Louisiana:

> "Those premises known as the Claw Corporation waste disposal facility in Iberville Parish, Louisiana, also known as EPA, Inc., Clear Land Air Water Corporation, Environmental Purification Advancement, Environmental Purification Abatement and possibly as the Rollins Environmental Services of Louisiana, or which are owned or operated by any other person or company, corporation or partnership, which premises and property are more particularly and further described as follows:
>
> "From the intersection of La. Highway 75 and La. Highway 3066, proceed South for approximately 7 miles; turn right and travel across the Bayor-Sorrel-Pontoon Bridge, a distance of approximately 0.2 miles; turn right, proceed northwest on Route 2, the Lower Levee Road, for approximately 1.6 miles at which point the pavement ends; at this point turn right, travel approximately 0.1 miles to the entrance of the injection well, which is believed to be owned by Rollins Environmental Services of Louisiana, Incorporated, all as is shown on the attached photos identified as Government Exhibits 1 and 2."
>
> "From the Rollins Environmental Services of Louisiana, Incorporated office, proceed South on the shell/gravel road for approximately 1.4 miles until the road deadends. This is the location of the field office of Clean Land Air and Water (CLAW), and storage tanks which are believed to be owned by Rollins Environmental Services of Louisiana Incorporated, all as is shown on the attached photos identified as Government Exhibits 3, 4, and 5.

(7) seize, inspect, sample, and photograph any evidence which constitutes or relates to or is part of a violation of the Federal Water Pollution Control Act (commonly referred to as the Clean Water Act, 33 U.S.C.§1251, et seq., and the Resource and Recovery Act of 1976 (42 U.S.C.§6901, et seq.);

(8) take such photographs of the above authorized procedures as may be required or necessary.

IT IS FURTHER ORDERED that a copy of this warrant shall be left at the premises at the time of the inspection.

IT IS FURTHER ORDERED that if any property is seized, the officer conducting the search and seizure shall leave a receipt for the property taken and prepare a written inventory of the property seized and return this warrant with the written inventory before me within 10 days from the date of this warrant.

IT IS FURTHER ORDERED that the warrant authorized herein shall be valid for a period of 10 days from the date of this warrant.

IT IS FURTHER ORDERED that the United States Marshal is hereby authorized and directed to assist the representatives of the United States Environmental Protection Agency in such manner as may be reasonably necessary and required to execute this warrant and the provisions contained herein, including but not limited to gaining entry upon the premises, the inspection and monitoring thereof, the seizure and sampling of materials, documents or equipment, and the photographing of the premises, and the materials or equipment thereon.

DATED this 10 day of August, 1978.

UNITED STATES MAGISTRATE

> "From the field office of CLAW, return to the site of the intersection at the paved lower levee road and the road leading to the deep well injection site (Rollins Environmental). Proceed northwest on the unpaved shell/gravel lower levee road approximately 6.1 miles to the entrance road and bridge leading to the gate guard house and gate of the EPA, Inc. waste disposal pits. This same entrance road is 7.7 miles northwest along the lower levee road from the intersection of the lower levee road and Bayou Sorrel Pontoon Bridge Road.

IT IS FURTHER ORDERED that the entry, inspection, investigation and monitoring authorized herein shall be conducted during regular working hours or at other reasonable times, within reasonable limits and in a reasonable manner from 6:00 a.m. to 10:00 p.m.

IT IS FURTHER ORDERED that the warrant issued herein shall be for the purpose of conducting an entry, inspection, investigation and monitoring pursuant to 33 U.S.C.§1318 and 42 U.S,C.§6927 consisting of the following:

(1) entry to, upon or through the above described premises, including all buildings, structures, equipment, machines, devices, materials and sites to inspect, sample, photograph, monitor or investigate the said premises;

(2) access to, seizure of and copying of all records pertaining to or related to the operation of the facility, equipment, waste materials which are accepted and stored on the premises and records which are required to be maintained under 33 U.S.C.§1318(a)(A), and 42 U.S.C.§6901, et seq., including any rules and regulations and orders promulgated thereto;

(3) inspection, including photographing, of any monitoring equipment or methods required by 33 U.S.C.§1318(a)(A), and 42 U.S.C.§6927;

(4) inspection, including photographing, of any equipment, processes or methods used in sampling, monitoring or in waste characterization;

(5) inspection, including photographing, of any equipment or methods used to dispose of or store waste substances;

(6) sample and seize any pollutants, effluents, runoff, soil, or other materials or substances which may reasonably be expected to pollute the waters of the United States under various conditions or threaten the public health, safety or welfare of the people of the United States;

RETURN OF SERVICE

I hereby certify that a copy of the within warrant was served by presenting a copy of same to Robert Prevost and Jack Tayl an agent of General Motors Corporation (GM) on August 1, 1978, at the GM Willow Run vehicle assembly plant, Ypsilanti, Michigan

(Name of person making service)

Acting Chief, Manufacturers Programs Branch
(Official Title within the United States Environmental Protection Agency)

RETURN

Inspection of the establishment described in this warrant was completed on August 4, 1978.

Name of EPA employee